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95-1742

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOHN DOE, A SEPTA EMPLOYEE,

Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; and JUDITH PIERCE, individually and in her official capacity,

Respondents.

Petition For A Writ Of Certioriari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORIARI

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QUESTION PRESENTED

Introductory Statement

The Court of Appeals reversed a jury verdict that the government had invaded the 14th Amendment right of privacy of a government employee. The government had discovered its employee's AIDS status and disseminated that information to others without it serving any legitimate government purpose and without providing adequate safeguards for an employee prescription list that contained the information. The Third Circuit Court of Appeals reversed finding its own facts that a legitimate government purpose was served. The Court did not acknowledge or consider any of the evidence established at trial of the personal AIDS hysteria of one high ranking SEPTA manager who had used her authority to obtain and investigate an employee prescription list. The evidence of personal purpose was clear and recognized by all other judges who reviewed this case: the judge of the District Court of the Eastern District of Pennsylvania, and the concurring and dissenting judges of the Third Circuit Court of Appeals.

Question

May a Court of Appeals reverse a jury verdict that there was a Constitutional invasion of privacy by ignoring evidence contrary to the ruling and instead establishing its own original factual findings to support its ruling?

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OPINIONS BELOW

The Memorandum Opinion and Order of the Court of Appeals is published at 72 F.3d 1133 and reprinted in this Petition at App. 1.

The Memorandum Opinion and Order of the District Court denying J.N.O.V. is published at 63 U.S.L.W. 2775 and reprinted in the Appendix at App. 37.

The Memorandum Opinion and Order of the District Court denying Motion for Summary Judgment is published at 886 F. Supp. 1186 and reprinted in the Appendix at App. 81.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered December 28, 1995. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 26, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2.

28 U.S.C. § 1291.

STATEMENT OF THE CASE

The Court of Appeals ruled that there was no constitutional invasion of privacy reversing a jury verdict and a trial judge's thirty-seven page opinion in favor of John Doe, a person with AIDS. The week-long trial revealed that a high ranking manager of a state owned mass transit system intentionally learned which employees she worked with had AIDS. This manager, Judith Pierce, discovered this by analyzing in detail a SEPTA Benefits Department employee prescription list. (The Benefits Department improperly received the list from a local pharmacy as part of SEPTA's effort to prevent fraud in its employee prescription plan.) The trial revealed that Judith Pierce reviewed the list for hours to determine who had AIDS and that she told other SEPTA employees what she discovered about John Doe's positive AIDS status. At trial, Judith Pierce admitted her learning and disseminating of John Doe's AIDS status served no SEPTA function. John Doe established that Ms. Pierce acted out of her personal hysteria about AIDS and not to benefit SEPTA.

The Court, in reversing, ruled that Judith Pierce's actions were for a legitimate government purpose. The Court made no mention of the evidence contrary to that finding. Thus, the Court usurped the jury's role and made a finding of fact on the linchpin issue in this case – Judith Pierce's purpose in learning of and distributing John Doe's AIDS status.

REASONS FOR GRANTING THE WRIT

The Court usurped the jury's function

A. All Reviewing Judges But One Acknowledged That The Basis Of The Jury's Verdict Was That Respondents' Motivation Was AIDS Hysteria

It is the duty of every reviewing court not to usurp the jury's role to find the facts. Thus, District Court Judge Yohn, Circuit Court Judge Greenberg and Circuit Court Judge Lewis all acknowledged and relied upon the jury's finding of the "primary factual issue in the case" – that Respondent Pierce, a government employee, reviewed government prescription records to learn if her coworkers had AIDS for her own personal reasons, i.e. reasons unrelated to any government interest. *Mem. Op.*, App. 27 (December 28, 1995, Greenberg, J.); *Mem. Op.*, App. 32-33 (December 28, 1995, Lewis, J.); *Mem. Op.*, App. 54-55 (June 1, 1995, Yohn, J).

Specifically:

> It was undisputed that the names on the report were unnecessary for Pierce's review of the Rite Aid [Pharmacy prescription] report and that knowing this, she nevertheless continued to look at the report and that as a result, Doe's diagnosis was disclosed to her. Similarly, there was no need for [coworker] Aufschauer to know Doe's name and medications as disclosed to him as a result of his assisting Pierce in reviewing the Rite Aid report. Lastly, there was no reason for [Doe's supervisor] Press to know Doe's name and medications as disclosed to him when Pierce showed him the marked up page of the report which contained that information. None

> of these people had a business need to know the names contained in that report.

Mem. Op., App. 34-55 (June 1, 1995, Yohn, J.)

> However, I do not believe that Judge Rosenn's opinion reflects the facts of the case in the light most favorable to Doe. . . . Clearly, Doe did not claim that Pierce highlighted the names merely for her research purposes, nor would he have described her behavior as "discreet." The jury's verdict for Doe, then, might reflect its agreement that with his assertions that her motivations, as well as her conduct, were improper.

Mem. Op., App. 27 (December 28, 1995, Greenberg, J.) (concurring).

> With respect to . . . the degree of need for access to the information, I note initially that at Doe's trial, Ms. Pierce, the SEPTA administrator responsible for auditing the company's health benefits plan, testified that for her purposes the employee names on the Rite-Aid printout were irrelevant. . . . While it is true that SEPTA could have legitimately requested these names for auditing purposes, the fact is that in this case it neither required nor requested such information. Thus, the jury had no factual basis upon which to conclude that SEPTA needed its employees' names in order effectively to audit its health plan.

Mem. Op., App. 32-33 (December 28, 1995, Lewis, J.) (dissenting) (footnote omitted).

B. Judge Rosenn Ignored AIDS Hysteria Evidence and Established His Own Factual Findings

Yet, Circuit Judge Rosenn, the author of the Opinion of the Court finding the 14th Amendment right to privacy was not violated, did not follow the jury's finding. Rather the Opinion of the Court made the opposite factual finding and instead stated that Respondent Pierce had learned who was taking AIDS medications for government "research purposes" because Ms. Pierce "was unfamiliar with [the medications] and which were expensive" as part of an "audit" of the prescription benefits plan. *Mem. Op.*, App. 13 (December 28, 1995, Rosenn, J.)

According to the Opinion of the Court, Pierce was engaged in an inspection and audit of prescription reports in order "to monitor the costs and uses of their employee benefit programs," and that "this was a legitimate function of their positions [and] they carefully controlled [the prescription information's] use." *Id.*, App. 20. Indeed, while Judge Rosenn acknowledged that the "names of the individual employees were unnecessary for this purpose," he developed the opposite factual conclusion ruling that Pierce "did not disclose any of the information contained in the report in anything than a legitimate manner. . . . [and that she] used the information received in a legitimate, careful and confidential manner . . . " *Id.*, App. 21.

A jury's factual determination is not to be so trifled with. The purpose of the trial is to make these very factual conclusions. This is especially so in the area of Constitutional rights. The Constitution, a living document, through its Bill of Rights, established privacy

restraints. The Founders were well aware that those in Government had long believed that they may learn what they wanted about their citizens and do what they wanted to their citizens. Here, the jury found that the Government and Respondent Pierce continued the Government's long tradition of supposed absolute power.

Indeed, Judge Rosenn never even asked the question if there was any evidence that established that Judith Pierce's "research" of the prescription list was personal.

> [W]e must be especially vigilant to keep foremost the question whether there is sufficient evidence of record to sustain the verdict of the jury. Reviewing the record in light most favorable to the non-moving party, judgment n.o.v. may not stand unless the record is "critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief." We must refrain from passing judgment on credibility issues; our task is to examine the record dispassionately for any evidence from which the jury may have rendered its verdict.

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3rd Cir. 1993), *quoting Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 190 (3rd Cir. 1992).

C. The Evidence of AIDS Hysteria of Judith Pierce Was Overwhelming

The Court's error in ruling *by caveat* that Judith Pierce's research was "legitimate" is even more remarkable considering her performance at trial. Judith Pierce spent days at trial trying to explain to the judge and the

jury why she was engaged in such "research." Remarkably, she made *no* explanation – not one. What she did explain was that the "research" of employee names was "unnecessary" and "irrelevant" to the work of SEPTA.

While she also explained at trial what problems there were in monitoring a prescription program, why she recommended the change over to Rite-Aid to run the program, what reports she expected to see from Rite-Aid, and why she was in the room when the head of benefits received the first Rite-Aid prescription reports, it was just an exercise in avoiding the central issue in the case: why she went through the reports for hours to find out who had AIDS, why she highlighted the names of those taking AIDS drugs, and why she told Mr. Aufschauer and Dr. Press that John Doe had AIDS.

In the end, the trial judge and jury decided she was not telling the truth when she conclusorily claimed such "research" was for SEPTA's purposes. They agreed with John Doe when he argued that she had a hysterical fear of people with AIDS and that that is what drove her decision to invade John Doe's privacy.

Indeed, the jury had a large body of evidence of Judith Pierce's AIDS paranoia and her true motives in rifling through private government files to learn John Doe's private fact – his HIV status. From 1990 to 1992, Judith Pierce asked three different SEPTA employees (John Doe, a SEPTA manager in the medical department; Richard Press, M.D., Director of SEPTA's Medical Department; and Louis Van Debeek, M.D., a SEPTA staff physician) for a list of names of those at SEPTA who had AIDS. Ex. A., pp. 18-26; Ex. B., pp. 45-51. Ex. A, pp. 18-26; Ex. B,

pp. 45-51.[1] They refused each time and told her such matters are confidential. *Id.*

Judith Pierce's inquiry was personal as she knew the medical cost effect of employees with AIDS on SEPTA was negligible. Ex. E, pp. 87-88. Judith Pierce also asked repeatedly how many SEPTA employees had AIDS. One such inquiry was a foreshadowing of things to come in this case. In March, 1992, she asked Jacob Aufschauer, SEPTA's director of Benefits, to find out the number of persons with AIDS. Ex. C, p. 101. He contacted Paid Prescriptions, Inc., a company that then monitored SEPTA's prescription drug plan, to review its prescription records and identify how many SEPTA employees take AIDS medications. *Id.* What was especially suspicious about this inquiry was that it was buried with other inquiries Mr. Aufschauer was then making related to negotiations about changing prescription plan vendors. *Id.*

Judith Pierce's deviant interest in who had AIDS was also known to others. Dr. Van Debeek was contacted by Judith Pierce and asked the use of certain medications. Ex. A, pp. 33-40; Ex. B, pp. 11-12. They were all drugs that treated those with AIDS. Dr. Van Debeek concluded just from these questions that "Judy has an AIDS List." *Id.* A conclusion which only could be drawn if he had earlier believed she was looking to make one.

Judith Pierce's interest in AIDS culminated in her personal review of an employee prescription list for

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[1] All references to exhibits refer to the Brief Appendix of Petitioner before the Third Circuit Court of Appeals.

hours to determine who was taking AIDS medications. Ex. C, pp. 96-99, 143-148; Ex. E, pp. 145-149, 154-155, 156-170, 181-183, 219-225, 227-230; Ex. F, pp. 206-214. She asked a SEPTA medical doctor about these medications and they were all AIDS-related. She was asking about John Doe's prescriptions. *Id.* She then highlighted only those employee names on the prescription list who were taking AIDS medications. *Id.* She showed this list to Mr. Aufschauer and pointed to John Doe's name. *Id.* She showed the list to Dr. Press and asked if he knew John Doe had AIDS. *Id.*

Judith Pierce's personal interest in AIDS was consistent with other erratic and arbitrary behavior she exhibited including: (a) consistently cursing and yelling at subordinates; (b) revealing to others that John Doe is gay in inappropriate contexts; (c) claiming that all vegetable street vendors have TB; (d) and ordering John Doe to summarily deny a SEPTA police captain's stress claim – a claim the captain based on Defendant Pierce's harassing conduct. Ex. B, 40-55.

CONCLUSION

Thus, petitioner seeks an order that upholds the verdict of the jury in this case or, in the alternative, mandates the Third Circuit Court of Appeals to base its opinion on the facts established at trial and not on the facts it established on appeal.

Respectfully submitted,

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Filed December 28, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1559

JOHN DOE, a SEPTA employee,

Appellee,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA), and JUDITH PIERCE, individually and in her official capacity,

Appellants.

Appeal from the Orders of the United States Court for the Eastern District of Pennsylvania
D.C. No. 93-cv-5988

Argued October 11, 1995

Before: Greenberg, Lewis and Rosenn, *Circuit Judges*

Opinion Filed December 28, 1995

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

This appeal requires that we probe the depth and breadth of an employee's conditional right to privacy in his prescription drug records. John Doe, an employee of the Southeastern Pennsylvania Transportation Authority (SEPTA),[1] initiated this action under 42 U.S.C. § 1983 against his self-insured employer, alleging that the defendants violated his right to privacy. Plaintiff claims that, in monitoring the prescription drug program put in place by SEPTA for fraud, drug abuse and excessive costs, the Chief Administrative Officer, Judith Pierce, and the Director of Benefits, Jacob Aufschauer, learned that John

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[1] SEPTA is a public transportation authority operating mass transportation facilities in the five-county Philadelphia metropolitan area. It operates subways, railroads, buses, and trackless trolleys and maintains stations, depots, and other installations. *See Transport Workers' Local 234 v. SEPTA*, 863 F.2d 110, 1113 [sic] (3d Cir. 1989). SFPTA receives much of its operating funds from state and federal subsidies. It is an agency of the Commonwealth of Pennsylvania. *Id.*, at 1113. The parties agree that all actions taken by Pierce relevant to this matter were part of her job as a policy-maker at SEPTA. Therefore, Doe's suit is proper under Section 1983.

Doe had contracted Acquired Immunodeficiency Syndrome (AIDS). This, he alleges, invaded his right to privacy.

A jury found for the plaintiff and awarded him $125,000 in compensatory damages for his emotional distress. The trial court denied defendants' motion under Rule 50 for judgment as a matter of law, or alternatively for a new trial. The court also denied defendants' motion for a reduction in damages. The defendants timely appealed. We reverse.

I.

We set forth the facts as the jury could have found them in support of its verdict. Accordingly, all evidence and inferences therefrom must be taken in the light most favorable to the verdict winner. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691-92 (3d Cir. 1993) (as amended on petition for rehearing). In 1990, Judith Pierce became the Chief Administrative Officer for SEPTA. Her responsibilities included containing the costs of SEPTA's self-insured health program. In 1992, a collective bargaining agreement with Local Union 234 required SEPTA to provide, inter alia, prescription drugs for the employees. SEPTA entered into a contract with Rite-Aid Drug Store to be the sole provider for all of SEPTA's prescription drug programs. As part of this contract, Rite-Aid provided SEPTA with an estimate of the yearly costs of this program. If, at the end of the year, the actual cost to Rite-Aid amounted to over 115% of that estimate, SEPTA would have to pay substantial penalties; however, if the actual cost was 90% or less of that estimate, SEPTA would

be entitled to rebates. Pierce was responsible for monitoring those costs.

John Doe is a SEPTA employee. At all times relevant to this appeal, Doe was HIV-positive, and had contracted AIDS by the time of trial. In 1991, Doe began to take Retrovir for his condition. Retrovir is a prescription drug used solely to treat HIV. Before filling his prescription, Doe asked Dr. Richard Press, the head of SEPTA's Medical Department and Doe's direct supervisor, if he or anyone else reviewed employee names in association with the drugs the employees were taking. Doe wished to keep his condition a secret from his co-workers. Dr. Press assured Doe that he had only been asked to review names on prescriptions in cases of suspected narcotics abuse and knew of no other review that included names. After receiving this information, Doe filled his prescription through the employer's health insurance. He continued to do so after SEPTA switched to Rite-Aid; he was never informed that this change might alter his confidentiality status.

In November of 1992, Pierce requested and received utilization reports from Rite-Aid. These reports were part of the contract between Rite-Aid and SEPTA. Pierce did not request the names of SEPTA employees in the reports, and Rite-Aid sent the reports in their standard format. They included statistics on the number of employees with five or more prescriptions dispensed in a one-month period, the top 25% by cost of drugs bought by SEPTA employees, and the report at issue here. This report listed employees who were filling prescriptions at a cost of $100 or more per employee in the past month. Each line of the report included the name of an employee or dependent, a

code to identify the prescribing doctor, the dispense date of the prescription, the name of the drug, the number of days supplied, and the total cost. Pierce called Aufschauer into her office, and the two of them reviewed the report. It was immediately apparent to Pierce that the reports would reveal employees' medications; however, she reviewed them in the format as submitted. She did not at that time request Rite-Aid to redesign SEPTA's reports to encode employees' names.

Pierce stated that her purpose in reviewing the reports with Aufschauer was several-fold. First, she wanted to look for signs of fraud and drug abuse. She testified that in the past, some employees would purchase prescription drugs under the SEPTA health plan in order to give them to an ill friend or relative who was not covered by SEPTA's benefit package. Second, Pierce wanted to determine if Rite-Aid was fulfilling its promise to use generic rather than brand name drugs whenever possible. Third, although they were both covered in the Rite-Aid contract, Pierce wanted to determine the cost to SEPTA of fertility drugs and medications to help employees stop smoking, such as nicotine patches. Finally, Pierce wanted to determine whether the reports were in a summary form and whether they would permit an audit. Her review, however, focused almost entirely on the current report, which included employees' names. She also testified that people who had seen this report, she, Aufschauer, and Dr. Press "were very careful to maintain the confidentiality of the people."

Pierce and Aufschauer scanned the reports. When they came across a drug name neither one recognized, they would look it up in a Physician's Desk Reference

(PDR) that Pierce had. Pierce then called Dr. Louis Van de Beek, a SEPTA staff physician, and inquired about the drugs not listed in the PDR. She asked the doctor for what Retrovir was used. When Dr. Van de Beek told her it was used in the treatment of AIDS, she inquired whether there was any other use for it. He told her no. She then asked about the three other medications that Doe was taking, and was informed that they were all AIDS medications as well. Pierce discreetly never mentioned Doe by name; however, Dr. Van de Beek was aware of Doe's condition and Doe's medications because Doe himself had disclosed this information to him. Therefore, Dr. Van de Beek deduced that Pierce was asking about Doe. He told her that if she were trying to diagnose employees' conditions through prescriptions, he felt this was improper and possibly illegal. Pierce immediately ended the conversation and told him not to speak of the conversation to anyone.

Pierce then took the report to Dr. Press. She asked him if he would be able to perform an audit using the information in the report. Press noted that Pierce had highlighted certain lines on the report, including employees' names and the drugs that each of those highlighted employees were taking. Press testified that the drugs highlighted were all HIV or AIDS-related. Pierce asked Press if he knew whether any of the people whose names were highlighted were HIV-positive. Press said that he was aware of Doe's condition. He then told Pierce that he was uncomfortable with the presence of the names on the report. He also told her that he had neither the expertise nor the resources to perform an audit.

Dr. Press then approached James Kilcur, the General Counsel of SEPTA, and expressed his concern about the names on the report. Kilcur called Pierce and asked her whether the names were necessary for her purposes. She replied that they were not and then destroyed the report. SEPTA then instructed Rite Aid to submit all future reports without names.

Dr. Van de Beek informed Doe of Pierce's questions. He told Doe that Pierce had likely found out that Doe was HIV-positive. Doe claims he became upset at this news. He avers that he became more upset upon discovering from Dr. Press that Pierce had his name highlighted on a list because he didn't know who had access to or had seen this "AIDS list" and only a few SEPTA employees knew of his HIV-status. He had told Press and Van de Beek, as well as his acting supervisor and the administrative assistant of his department that he had AIDS. He testified that these were all people he trusted to keep this information confidential, and he wanted to explain to them his need for periodic leaves of absence. He did not want Pierce to know of his condition.

After these incidents, Doe remained at SEPTA in his current position. He makes no claim of personal discrimination or of any economic deprivation. He later received a salary upgrade and promotion. However, he testified that he felt as though he were being treated differently. A proposal he had made for an in house employee assistance program met with scant interest; he felt that this was because of his HIV condition. In addition, an administrator who reported to Pierce did not call on Doe to assist in the same way that he had called on Doe earlier. Doe testified that he felt as though there was less social

chitchat, co-workers ate less of the baked goods he brought to the office to share, and that his work space seemed more lonely than before. He also became fearful of Pierce, who never told Doe that she knew of his illness. Doe alleges that he became depressed and requested a prescription for Zoloft, an antidepressant, from his physician. Later, another antidepressant called Elavil was added to the medications Doe was taking.

Doe filed suit in the United States District Court[2] against Pierce in both her individual and official capacities, and against SEPTA. Defendants moved for summary judgment on the grounds that Doe had no right to privacy in the information contained in the Rite Aid report; that if he did have such a right it had not been violated because no disclosure had occurred; and that any interest Doe might have in the privacy of these records was outweighed by their legitimate interests in the information. These arguments were rejected by the district court, which denied their motion.

After a jury trial, defendants moved under Rule 50 for judgment as a matter of law, or, alternatively, for a new trial under Rule 59. They also moved for a reduction in damages on the grounds that Doe had not proved emotional distress as a result of defendants' actions. The judge granted their motion as to plaintiff's failure to train

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[2] Doe also filed a related suit against Rite-Aid and its employees in a Philadelphia Court of Common Pleas. That case was settled late in 1994, when Rite-Aid agreed to modify its billing procedures in the state of Pennsylvania in order to prevent these disclosures in the future. *See* 22 BNA Pension and Benefits Reporter 33 (Jan. 2, 1995).

claim,[3] but in all other respects rejected the defendants' motions.

II.

The issues raised here present questions of constitutional law. Because this case comes to us on appeal from an order denying a motion for judgment as a matter of law, our review is plenary. *Epstein v. Kmart Corp.*, 13 F.3d 762 (3d Cir. 1994); *Cole v. Flick*, 758 F.2d 124 (3d Cir.), *cert. denied*, 106 S.Ct. 253 (1985).

As a preliminary matter, this court must decide if a person's medical prescription record is within the ambit of information protected by the Constitution. If there is no right to privacy, our inquiry stops. A § 1983 action cannot be maintained unless the underlying act violates a plaintiff's Constitutional rights. Minor annoyances do not make a federal case. When the underlying claim is one of invasion of privacy, the complaint must be "limited to those [rights of privacy] which are 'fundamental' or 'implicit in the concept of ordered liberty' . . . " *Paul v. Davis*, 424 U.S. 693, 713, *reh'g. denied*, 425 U.S. 985 (1976), *citing Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Medical records fall within this scope. The Supreme Court, in *Whalen v. Roe*, 429 U.S. 589 (1977), noted that the right to privacy encompasses two separate spheres. One of these is an individual's interest in independence in making certain decisions. The other is an interest in avoiding disclosure of personal information. *Whalen*, at

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[3] This ruling is not before us, as it has not been appealed.

599-600. Medical records fall within the second category. *Id.* Therefore, the Court held that individuals do have a limited right to privacy in their medical records. *Id.* at 602.

This court reinforced this holding through our decision in *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980). In that case, the federal government, through the Occupational Safety and Health Agency (OSHA), issued a subpoena duces tecum to an employer for its employees' medical records in connection with an investigation of a potentially hazardous work area. The employer refused, asserting the privacy interests of its employees. This court held that, on balance, the interests of the government in the information outweighed these privacy interests; however, they recognized that such records were deserving of a level of constitutional protection. "There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *Westinghouse*, at 577.

The records at issue in *Westinghouse* included "results of routine testing, such as X-rays, blood tests, pulmonary function tests, hearing and visual tests." *Id.* at 579. If these records are private, then so must be records of prescription medications. Since the *Westinghouse* decision fifteen years ago, medical science has improved and specialized its medications. It is now possible from looking at an individual's prescription records to determine that person's illnesses, or even to ascertain such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs. This information is precisely the sort intended to be protected by penumbras

of privacy. *See Eisenstadt v. Baird*, 405 U.S. 438, 450 (1972) ("If the right of privacy means anything, it is the right of the individual . . . to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). An individual using prescription drugs has a right to expect that such information will customarily remain private. The district court, therefore, committed no error in its holding that there is a constitutional right to privacy in one's prescription records.

III.

Such a right is not absolute, however. *See Whalen v. Roe*, 429 U.S. at 602 (while individuals have a legitimate expectation of privacy in their prescription purchases of controlled substances, such right must be weighed against the state's interest in monitoring the use of dangerously addictive drugs).

> [D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.

Id. In addition, disclosure of private medical information is necessary for the pharmacy filing [sic] the prescriptions. The Court also cited examples of statutory reporting requirements relating to various diseases, child abuse, injuries caused by deadly weapons, certifications of fetal death, and the recordkeeping requirements of Missouri abortion laws. *Id.* n. 29. As with many individual rights,

the right of privacy in one's prescription drug records must be balanced against important competing interests.

Before we can perform this balancing test, we must first assess whether, and to what extent, Pierce disclosed Doe's prescription drug information. Obviously, no privacy violation would have taken place had the information from Rite-Aid come in encoded form. A self-insured employer has a right to monitor the use and cost of its health insurance plan. SEPTA's status as a public authority substantially dependent on the public fisc and the rates the public must pay to use its facilities converts this right into a duty. Audits of drug information are essential to that end. In the aggregate, there is no competing privacy interest in those records. Doe would have no cause of action if all that had been disclosed were that an unknown number of people at SEPTA were purchasing Retrovir for the treatment of HIV-related illnesses. Therefore, such disclosure as occurred came only when Doe's name was revealed with respect to his purchase of drugs under SEPTA's prescription drug program.

Both Pierce and Aufschauer learned of Doe's illness through the Rite-Aid report. Pierce's initial discovery of the names on the report was inadvertent. She had not requested names from Rite-Aid and there is no evidence that she expected to find them when she opened their standard report. This alone would not be sufficient to prove a constitutional violation for disclosure.[4] However, Pierce then spent some time and effort researching the

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[4] We need not discuss in this case any possible violation on the part of Rite-Aid for preparing such a report. See *supra*, n.2.

report with the names on it. She highlighted, for her research purposes, those names on the report whose medications she was unfamiliar with and which were expensive, including Doe's, and called two SEPTA staff physicians to ask about medications she did not recognize. It was through this inquiry that Pierce learned about Doe's condition. She did not know the uses of Retrovir before she did this research.

Aufschauer learned of Doe's condition through his work as Director of Benefits and Pierce's subordinate. Pierce disclosed the information to him in the course of their work. SEPTA argues that this disclosure was necessary, as Aufschauer also had reasons for needing this information. Aufschauer's legitimate need for this information may affect whether the disclosure is an actionable one. It does not alter the existence of disclosure.

Nor can Pierce and Aufschauer be considered as a single unit for the purpose of determining disclosure. A disclosure occurs in the workplace each time private information is communicated to a new person, regardless of the relationship between the co-workers sharing that information. By analogy, district courts in this circuit have held that there is publication, such that a libel or slander is actionable, when the defamatory statement is disclosed only to the speaker's agent. *Elbeshbeshy v. Franklin Institute*, 618 F.Supp. 170 (W.D. Pa. 1985). Therefore, we hold that each person who learned of Doe's condition constitutes a separate disclosure for the purposes of Doe's invasion of privacy action.

To hold differently would lead us to a decision that Doe had waived his right to privacy by voluntarily

disclosing his medical condition to co-workers at SEPTA. We are not faced with a situation where persons to whom Doe disclosed this information told others. Rather, Pierce and Aufschauer learned his condition completely independently of Doe's disclosures. His decision to give private information to some co-workers does not give carte blanche to other co-workers to invade his privacy. *See* Laurence Tribe, *American Constitutional Law*, 2d ed., at 1391 ("[W]hat could be more commonplace than the idea that it is up to the individual to measure out information about herself selectively[?]. . . . [A] secret remains a secret even when shared with those whom one selects for one's confidences.")

However, we are not persuaded that the impingement on Doe's privacy by the disclosure to SEPTA's Chief Medical Officer, Dr. Press, amounts to a constitutional violation. Doe himself had already voluntarily informed Dr. Press of his condition. Dr. Press did not learn any new information from Pierce's actions. Plaintiff asserts that Dr. Van de Beek, as well, learned of the information from Pierce. Van de Beek, like Dr. Press, had already heard of Doe's condition from Doe himself. Moreover, Pierce did not disclose Doe's name to Van de Beek. She asked him about medications, and he deduced who she was asking about based on his independent knowledge of Doe's condition. It stretches any theory of liability far too thin to base an invasion of privacy on such conduct. Therefore, there was no disclosure to Dr. Van de Beek. Also, as a matter of law, the cursory disclosure Pierce made to Dr. Press, chief of SEPTA's medical department, a physician, and largely responsible for the health of SEPTA's employees, did not "amount to an impermissible invasion

of privacy," *Whalen v. Roe*, 429 U.S. at 602, because John Doe had already provided him with this information. Pierce and Aufschauer are the only disclosures to be weighed and balanced.

IV.

As we noted earlier, an individual's privacy interest in his or her prescription records is not an absolute right against disclosure. This interest must be weighed against the interests of the employer in obtaining the information. We apply an intermediate standard of review in making this determination. *Fraternal Order of Police, Lodge 5 v. Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987) (hereafter *FOP*). *FOP* also noted that the more stringent "compelling interest analysis" would be used when the intrusion on an individual's privacy was severe. We are not faced with such a situation here. The intrusion upon Doe's privacy was minimal at worst.

This court has previously enumerated the factors to be weighed in determining whether a given disclosure constitutes an actionable invasion of privacy in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980). In Westinghouse, the federal government, through OSHA, served a subpoena duces tecum on Westinghouse for its employees' medical records in connection with an investigation concerning a possible health hazard in the workplace. Westinghouse, as employer, moved to quash the subpoena, asserting, *jus tertii*, its employees' rights of privacy in those records. Here, in contrast, SEPTA is the employer, who legitimately sought prescription information to ascertain whether there were abuses of its health

program, either by the supplier or the consumer/employee. Moreover, the remedy sought for the alleged invasion here is damages rather than a quashing of a subpoena. However, the *Westinghouse* factors are still good law, and are equally applicable to this situation.

Westinghouse mandates a consideration of seven different factors. They are: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest favoring access. *Westinghouse,* 638 F.2d at 578. Although some of these factors may be in Doe's favor, overall, we believe the balance weighs on the side of permitting the disclosures present here. There is a strong public interest of the Transportation Authority, and the many thousands of people it serves, in containing its costs and expenses by permitting this sort of research by authorized personnel. This interest outweighs the minimal intrusion, particularly given the lack of any economic loss, discrimination, or harassment actually suffered by plaintiff.

The type of record requested here was the first printout of prescription medications furnished by SEPTA to its employees under its contract with the supplier, Rite-Aid. No particular format and no names were requested. The information which Pierce expected it to contain was nothing more than a record of the drugs on which SEPTA had

spent over $100 in a given month per individual. However, Rite-Aid, on its own initiative, included in its format the names of each person taking those drugs. As discussed above, this inadvertently-received information is entitled to a measure of confidential protection.

In addition, we recognize the possible harm to Doe from disclosure. The district court of New Jersey, in *Doe v. Borough of Barrington*, 729 F.Supp. 376 (D.N.J. 1990), recognized the social stigma, harassment, and discrimination that can result from public knowledge of one's affliction with AIDS. *Id.* at 384, n.8. It is unfortunate that public understanding of this disease has changed so little in the intervening years. Although AIDS hysteria may have subsided somewhat, there still exists a risk of much harm from non-consensual dissemination of the information that an individual is inflicted with AIDS.

This potential for harm, however, should not blind us to the absence of harm in this case. Despite Pierce's disclosures to her subordinate, Aufschauer, and to Dr. Press that Doe had AIDS, SEPTA promoted him and still retains him in his responsible position. In *Doe v. Borough of Barrington*, a borough police officer, without justification, told the neighbors of a man suffering from AIDS that the entire family had AIDS. The neighbors reacted by organizing a protest, and trying to prevent the man's children from attending public school. In that case, the court quite rightly held such conduct violated the plaintiffs' privacy rights, and there was no competing interest to justify the disclosure.

By contrast, SEPTA had legitimate reasons for obtaining the prescription information from Rite-Aid. Pierce

had requested the information in Rite-Aid's standard format; she did not request the names of any employees. She did not disclose the information relating to Doe except to Aufschauer, in connection with their review, and to Dr. Press, for purposes of an audit. Dr. Press, the Chief Medical Officer, already knew of Doe's condition through Doe's voluntary disclosure. Moreover, Pierce destroyed the first report. Under these circumstances, we cannot conclude that *Westinghouse* factor (3) would impose liability on SEPTA. Although the factor appears to address potential harm, such potential harm must be measured within the context of the disclosure that actually occurred. The potential for harm from a different disclosure of this information, under different circumstances, as in *Westinghouse,* is not germane here.

The record was generated from the relationship between Doe and Rite-Aid, through his filling of the prescription. It is difficult to see how this relationship is affected by Rite-Aid's subsequent generating of reports to Doe's employer. Doe is no doubt aware that insurance companies and providers such as Medicare and Medicaid routinely receive information from drugstores about prescriptions charged to them by the insured. Self-insured employers have the same rights as those providers to similar information. Pierce did not expect that SEPTA would be given access to the names of employees filling prescriptions; however, the harm from this to the Doe-Rite-Aid relationship is non-existent. Once Pierce realized the potential for harm inherent in a report with names, she instructed Rite-Aid that the format for all future reports should be without names. Rite-Aid agreed to

comply. Rite-Aid's relationship with SEPTA employees will continue unchanged.

Judge Greenberg is of the opinion that the "injury from disclosure" would seem to apply to the relationship between Doe and his employer, not between Doe and Rite-Aid. Thus, he believes that the injury from disclosure to the relationship in which the record was generated could obviously be much greater, if the relevant relationship is between the employer and employee. He concludes, therefore, that factor four may have weighed in favor of Doe in the jury's analysis. However, it must be borne in mind that, even if the injury from disclosure was to the relationship between Doe and SEPTA, it is undisputed that he suffered no economic deprivation, nor any discrimination, nor harassment. It should also be noted that Judge Greenberg nonetheless believes that, because of our conclusion regarding *Westinghouse* factors six and seven, Doe cannot recover.

Factors six and seven strongly favor the defendants. Pierce had a genuine, legitimate and compelling need for the document she requested. Aufschauer, as Director of Benefits, also had a need for the document. Each had a responsibility and obligation to keep insurance costs down and to detect fraudulent and abusive behavior. The report was intended for that purpose. Employers have a legitimate need for monitoring the costs and uses of their employee benefit programs, especially employers who have fiscal responsibilities, as does SEPTA, to the public. As health care costs rise, as they have in recent years, and employers become obligated to expand employee coverage with greater protection for more illnesses and health conditions, health care costs become a major concern for

employers as well as for Congress. Ten years ago, health insurance was not among the top concerns of small businesses; today it is number one. Note, "Health Care Cost-Containment and Small Businesses: The Self-Insurance Option," 12 J.L. & Com. 333 (1993). In recent years many industrial strikes have been motivated by the cost of health benefits sought by employees. One of the best ways to monitor these costs is by performing audits on the use to which health plans are being put, and by closely monitoring the use of drugs.

Employers also have a right to ensure that their health plan is only being used by those who are authorized to be covered. Finally, the employers have a right to contain costs by requiring that employees use generic drugs rather than brand name when an adequate substitute exists. To accomplish these goals, employers must have access to reports from their prescription suppliers, and they must inspect and audit those reports. That is precisely what Pierce and Aufschauer were engaged in, and this was a legitimate function of their positions. They had a legitimate need for access to information from the drug supplier, and they carefully controlled its use.

Because SEPTA is an agency subsidized by the state and federal government, its operating costs are substantially borne by the public who use its facilities and the taxpayers who pay its subsidies. Keeping fares and taxes low, and preserving the public fisc are genuine, recognizable public interests. Therefore, Pierce's need for access, factor six of Westinghouse, also articulates a recognizable public policy encouraging access, as noted in factor seven.

As Chief Administrative Officer for SEPTA, Pierce had responsibility for health costs. Her ability over a period of three years to successfully reduce prescription drug and dental costs by a combined total of over $42,000,000 gives us some idea of the immensity of her task and the money at stake. The new contract between SEPTA and Rite-Aid gave strong financial incentives to cut costs if possible. There can be no serious argument that Pierce could do this monitoring without being able to audit reports of the actual costs and the drugs purchased. It is true that the names of the individual employees were unnecessary for this purpose.[5] It is equally true that Pierce did not request such names, nor did she disclose those names, or any of the information contained in the report, in anything other than a legitimate manner. Except for Dr. Press, who had the information directly from Doe, the only other person to whom Pierce disclosed the information was Aufschauer. As they requested only information for which they had a legitimate and compelling need, and used the information received in a legitimate, careful and confidential manner, it cannot be said that they violated Doe's right to privacy merely because the first report from Rite-Aid contained

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[5] There may be situations not before us now where an employer who pays for prescriptions or benefits for employees or their dependents may need to know the identity of a person obtaining the prescriptions or benefits. After all, an employer might need this information to determine whether the person obtaining the prescriptions or benefits was eligible for them, or if the person was even an employee. Of course, such need to know would have to comply with the employee's right of privacy as well.

unnecessary, unrequested information in which he had a privacy interest.

Factor five, however, requires a slightly more complex analysis. It requires us to weigh "the adequacy of safeguards to prevent unauthorized disclosure." As discussed above, there was no unauthorized disclosure. However, as SEPTA was unaware that they would receive such confidential information, and this was their first experience under the Rite-Aid contract, there were no safeguards in place.

In *FOP, supra,* the Philadelphia police department required applicants to the Special Investigative Unit (SIU) to complete questionnaires, which asked for extremely private information. Police officers sought an injunction against its use. One grouping of questions focused on the medical history of the applicant and his family, asking for such information as physical disabilities, prescription drug use, and past psychological histories. *FOP,* 812 F.2d at 112. Although noting that, in most cases, this private information was irrelevant to the selection of SIU forces, the court also recognized that in some cases, these questions would reveal information essential to the police department. *Id.* at 113. Therefore, the court permitted the City to ask these questions of all applicants.

However, the court expressed concern with the absence of protection of this information. It noted that "there is no statute or regulation that penalizes officials with confidential information from disclosing it." *Id.* at 118. As a result, the court remanded to the district court with directions to continue the injunction until the "City,

the Commissioner, or other appropriate official establishes written, explicit and binding rules that contain adequate safeguards against unnecessary disclosure of the confidential information . . . " *Id.*

Were the case before us now also a request for an injunction, and had SEPTA requested the broad information required by the Philadelphia police department, we might have similar concerns. This case, however, is a suit for damages and the information disclosed did not have the breadth requested by the Philadelphia SIU. Doe did not attempt to enjoin further dissemination by SEPTA, although he is still employed by it. Indeed, such a suit would have been moot at its inception. SEPTA has established an adequate safeguard against a recurrence of unnecessary disclosure by requesting that Rite-Aid no longer send such confidential information. Should such information become necessary at some future time, for instance, should names be needed for a more extensive investigation as a result of an initial audit, it can be expected that "written, explicit and binding rules" would be promulgated before such information is requested. But it is an unnecessary burden to require that they be announced when the employer has no knowledge that it will be in receipt of the sort of information that requires these safeguards. Unlike the defendant in *FOP*, Pierce and SEPTA did not request such information as would put them on notice that they would need to pre-arrange for its confidential handling. Thus, we perceive no violation of the *Westinghouse* fifth factor.

We hold that a self-insured employer's need for access to employee prescription records under its health insurance plan, when the information disclosed is only

for the purpose of monitoring the plans by those with a need to know, outweighs an employee's interest in keeping his prescription drug purchases confidential. Such minimal intrusion, although an impingement on privacy, is insufficient to constitute a constitutional violation. The district court should have granted defendants' Rule 50 motion for judgment as a matter of law.

V.

In light of the conclusion we reach that the defendants did not violate plaintiff's right of privacy, we need not decide whether the plaintiff's testimony alone of his diagnosis and subjective impressions can support a finding of damages for emotional distress.[6] *See Spence v. Board of Education of Christina School District*, 806 F.2d 1198, 1201 (3d Cir. 1986).

VI.

SEPTA demonstrated important interests in the prescription information furnished by its supplier, and disclosed such information only to people with a right to know. This outweighs the minimal intrusion into Doe's privacy. The district court erred in its analysis of the *Westinghouse* factors, and should have granted defendant's motion for judgment under Rule 50.

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[6] Plaintiff admits that he suffered no economic damages or physical injury from SEPTA's actions. He was not fired or demoted. Emotional distress, therefore, is Doe's only possible basis for recovery.

Accordingly, the judgment of the district court will be reversed, and the matter will be remanded to the district court for entry of judgment for the defendants as a matter of law. Each side to bear its own costs.

GREENBERG, *Circuit Judge, concurring.*

Although I agree with Judge Rosenn's conclusions, I have a few reservations about his opinion that I note here.

First, regarding our standard of review: as Judge Rosenn indicates, after a jury verdict, the court cannot substitute its view of the evidence for that of the jury; accordingly, all evidence and inferences therefrom must be taken in the light most favorable to the verdict winner. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691-92 (3d Cir. 1993) (as amended on petition for rehearing). In addition, we have noted that a court of appeals in exercising plenary review over an order granting or denying a motion for judgment as a matter of law must apply the same standard as did the district court. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993); *Lippay v. Christos*, 996 F.2d 1490, 1496 (3d Cir. 1993). We recently outlined the relevant standard:

> In deciding whether to grant a motion for JNOV, the trial court must view the evidence in the light most favorable to the non-moving party, and determine whether the record contains the 'minimum quantum of evidence from which a jury might reasonably afford relief.' *Keith v. Truck Stops Corp.*, 909 F.2d 743, 745 (3d Cir. 1990) (citations omitted). The court may not weigh the evidence, determine the credibility of witnesses or substitute its version of the facts

> for that of the jury. *Blair v. Manhattan Life Ins. Co.*, 692 F.2d 296, 300 (3d Cir. 1982). The court may, however, enter judgment notwithstanding the verdict if upon review of the record, it can be said as a matter of law that the verdict is not supported by legally sufficient evidence. *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970).

Parkway Garage, 5 F.3d at 691-92.

I join in Judge Rosenn's opinion because I believe that, even viewed in the light most favorable to Doe, the verdict winner in the district court, the facts of this case cannot, as a matter of law, support the jury's verdict. I support this holding because factors six and seven of the balancing test announced in *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980), namely SEPTA's need for access to the prescription information and "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access," outweigh Doe's limited privacy interests in the information. It is here that, in my view, the district court in its opinion denying SEPTA's post-trial motions for judgment as a matter of law or for a new trial misapplied the *Westinghouse* balancing test. The court decided that, because Pierce "never articulated a need to know what Doe's medications were used for or a reason that she did not put the report aside or black out the names when she saw them," and because there was testimony that "the names of the individual employees were irrelevant to the issues they were examining," the jury reasonably could have found factor six to weigh in favor of a violation of Doe's privacy right. *See Doe v.*

SEPTA, et al., No. 93-5988, slip op. at 19 (E.D. Pa. June 1, 1995). Likewise, because "the financial need to control prescription benefit costs . . . does not include a need to have the names of employees linked with their medications, at least until an abuse of the benefit has been established," the district court decided that the jury also could have found factor seven to weigh in Doe's favor. *See id.* slip op. at 20.

However, the district court's emphasis on SEPTA's need to have the names of employees linked with their medications was misplaced. The focus of factors six and seven of the *Westinghouse* balancing test in this case should not be on appellants' need to have the names of employees linked with their medications, but instead should be on their need to have access to prescription utilization data in the first place. As Judge Rosenn's opinion notes, it is essential in this era of escalating health care costs that self-insured employers be able to review their benefits programs for proper usage, cost-cutting possibilities, and fraud and abuse, among other factors. Thus, I agree with his conclusions.

However, I do not believe that Judge Rosenn's opinion reflects the facts of the case in the light most favorable to Doe. For example, in describing Pierce's actions with respect to the Rite-Aid report, he states that she highlighted the names on the report whose medications she was unfamiliar with "for her research purposes," *see* majority opinion at 1139, and that she "discreetly never mentioned Doe by name" to Dr. Van de Beek. *Id.* at 5. Yet, Pierce's motivations for highlighting the names of the employees, in particular Doe's, was a primary factual issue in the case, as was her possible carelessness.

Clearly, Doe did not claim that Pierce highlighted the names merely for her research purposes, nor would he have described her behavior as "discreet." The jury's verdict for Doe, then, might reflect its agreement with his assertions that her motivations, as well as her conduct, were improper. In any case, it does not seem that Judge Rosenn's opinion paints the issue in the light most favorable to a verdict for Doe. Although I regard this point as somewhat academic because of my analysis of the *Westinghouse* factors, it is worth noting because of our clear mandate to view the facts in the most favorable light to the verdict-winner in reviewing a denial of a motion for judgment as a matter of law.

More substantively, I do not agree with Judge Rosenn's analysis regarding Pierce's contact with Dr. Press. While it is true that Dr. Press did not acquire any new information from Pierce's actions, the focus of an inquiry into an alleged violation of the constitutional right to privacy should be on whether there was a disclosure. As an initial matter, Pierce showed Dr. Press the highlighted list containing Doe's name and prescription information. Pierce did not know whether Dr. Press had any prior knowledge regarding Doe's condition; nevertheless, she presented the information to Press. The constitutional right to privacy is intended to prevent certain disclosures. Thus, ordinarily individuals have the power to determine to whom they disclose their most personal matters. Here, Pierce impinged on Doe's right with the disclosure to Press in the same way that she did so with respect to the disclosure to Aufschauer. As Judge Rosenn's opinion states, "[a] disclosure occurs in the

workplace each time private information is communicated to a new person. . . . " Majority opinion at 10-11.

Yet Doe himself already had informed Dr. Press voluntarily of his condition. Pierce's disclosure to Press, then, should not lead to Doe's recovery of damages, since the disclosure left Doe in the same position as before it occurred. This issue is one of damages alone, however, and does not affect the existence of a disclosure to Press. Thus, the court must weigh this disclosure as well as those involving Pierce and Aufschauer in order to determine whether a constitutional violation occurred. Accordingly, in my view it is not enough simply to state that because no damages were incurred there could not have been a violation of Doe's privacy right. In the end, though, the existence of a third disclosure in the case does not alter my analysis of the *Westinghouse* factors and therefore does not change my ultimate conclusion that we should reverse the judgment of the district court.

I also want to make a clear distinction between an impingement into privacy rights that is justified according to the *Westinghouse* factors, and an *unconstitutional* violation of the right to privacy. We have held that questions seeking personal medical information included in a police department questionnaire for use in selecting applicants for a special investigations unit "[did] not unconstitutionally impinge upon the applicants' privacy interests." *Fraternal Order of Police v. Philadelphia*, 812 F.2d 105, 114 (3d Cir. 1987) (footnote omitted). We also have held that the strong public interest in facilitating the research and investigations of a government agency into a potentially hazardous work area "justif[ied] [the] minimal intrusion into the privacy which surrounds

. . . employees' medical records. . . . " *Westinghouse*, 638 F.2d at 580. However, in neither case did we deny that an intrusion into privacy interests occurred. Likewise, here we do not deny that Pierce's disclosures impinged upon Doe's privacy interests in his prescription information. We do find, however, that the disclosures were justified according to the *Westinghouse* balancing test because of SEPTA's strong interest in having access to utilization review data from its prescription drug program. Thus, although there was an *impingement* into Doe's privacy rights, there was not here an *unconstitutional violation* of those rights.

Finally, regarding specific applications of the *Westinghouse* factors: *Westinghouse* factor four, "the injury from disclosure to the relationship in which the record was generated," would seem to me to apply to the relationship between Doe and SEPTA, not the relationship between Doe and Rite-Aid, as Judge Rosenn's opinion states. The relationship between Doe and his employer underlies the prescription benefits package in the first place; were it not for that benefits package, Doe would not have filled his prescription at Rite-Aid, nor would his name have been on the Rite-Aid report. In this regard, the injury from disclosure to "the relationship in which the record was generated" obviously could be much greater if the relevant relationship is that between Doe and his employer and not the Doe-Rite-Aid relationship. Thus, the factor may have weighed more heavily in favor of Doe in the jury's analysis than Judge Rosenn's opinion indicates. Nevertheless, because of my conclusions regarding *Westinghouse* factors six and seven, I still

believe that Doe cannot recover for the disclosures made in this case.

Westinghouse factor five, "the adequacy of safeguards to prevent unauthorized disclosure," also could have weighed more heavily in favor of Doe in the jury's analysis than Judge Rosenn indicates. While it is true that Pierce and SEPTA did not request such information as would put them on notice that they would need to prearrange for its confidential handling, it would not have been unreasonable for the jury to conclude that SEPTA should have had some sort of policy regarding the confidentiality of employee medical information that would have put Pierce on notice of the sensitivity of the information she received. Moreover, it also would have been reasonable for the jury to expect Pierce to act more carefully with the information regardless of the existence of an official SEPTA policy, especially because of her high executive level in the company, in addition to her experience as a former government attorney. Thus, although factor five does not change my ultimate conclusion in the case, perhaps it weighed more heavily in favor of Doe, at least in the jury's consideration, than Judge Rosenn's opinion would suggest.

I make one final point. As Judge Rosenn notes, SEPTA did not request the names of its employees obtaining prescription drugs. Consequently, the case has been decided on the assumption that it did not need the names. Nevertheless, I do not understand that there is any legal impediment to an employer who pays for prescriptions or other benefits for employees and their dependents insisting on knowing the identity of the person obtaining the prescriptions or benefits. After all, an

employer might need this information to determine whether the person obtaining the prescriptions or benefits was eligible for them. Judge Rosenn makes this important point, majority opinion n.5, and I particularly want to emphasize it. In accordance with the foregoing comments, I join in Judge Rosenn's opinion with the caveats I have stated and join in the judgment of the court.

LEWIS, *Circuit Judge*, concurring and dissenting.

I agree with and join in that part of Judge Greenberg's concurring opinion which pertains to the first five *Westinghouse* elements. However, because I believe that there was more than a "minimum quantum" of evidence from which the jury in Doe's case could reasonably conclude that his constitutional right to privacy had been violated, I respectfully dissent. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir. 1990).

Because my disagreement with the majority rests primarily with its analysis of the sixth and seventh *Westinghouse* factors, I will focus my discussion on those elements.

With respect to the sixth factor, which addresses the degree of need for access to the information, I note initially that at Doe's trial, Ms. Pierce, the SEPTA administrator responsible for auditing the company's health benefits plan, testified that for her purposes the employee names on the Rite-Aid printout were irrelevant. In fact, the district court specifically noted that "it was undisputed that the names on the report were unnecessary for Pierce's review of the Rite Aid report." (J. Yohn's Memorandum at 6, 16-17). While it is true that SEPTA could

have legitimately requested these names for auditing purposes, the fact is that in this case it neither required nor requested such information.[1] Thus, the jury had no factual basis upon which to conclude that SEPTA needed its employees' names in order effectively to audit its health plan.

I disagree that "[t]he focus of factors six and seven of the *Westinghouse* balancing test in this case should not be on appellant's need to have the names of employees linked with their medications, but instead should be on their need to have access to prescription utilization data in the first place." (Concurring Op. at 21). First, I am aware of no authority which suggests that this broad approach is the correct way in which to frame the issue. Second, the jury's finding that Pierce had no need for the names on the Rite-Aid printout is not inconsistent with the principle that SEPTA may have had a legitimate need for access to prescription utilization data. Thus, because in my view the record clearly establishes that for purposes of auditing its prescription drug program with Rite-Aid, SEPTA did not necessarily need a printout that indicated by name what prescription drugs particular employees were taking, I cannot agree that the verdict was "not supported by legally sufficient evidence." As Judge Greenberg notes in his concurring opinion, the *Parkway Garage* standard requires the trial court, and us,

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[1] The first *Westinghouse* factor is the "type of record requested." In this case, SEPTA did not request that the printout from Rite-Aid include employee names. As a result, I believe that this element of the balancing test does not weigh in Doe's favor.

to "view the evidence in the light most favorable to the non-moving party, and determine whether the record contains the 'minimum quantum of evidence from which a jury might reasonably afford relief.' *Keith v. Truck Stops Corp.*, 909 F.2d 743, 745 (3d Cir. 1990) (citations omitted)," and to avoid " 'weigh[ing] the evidence, determin[ing] the credibility of witnesses or substitut[ing] [our] version of the facts for that of the jury.' *Blair v. Manhattan Life Insurance Co.*, 692 F.2d 296, 300 (3d Cir. 1982)." *Id.* at 1. Accordingly, we must adhere to the *Parkway Garage* standard and allow the appropriate measure of deference to the jury's findings. For the above reasons, I do not believe that the majority has done so with regard to the sixth *Westinghouse* factor.

With respect to the seventh *Westinghouse* factor, I agree that there is an important public interest in allowing companies such as SEPTA, which administer their own health plans, to have access to the prescription drug records of their employees. (Maj. Op. at 15). In general, I would agree that such employers have a legitimate need for this information. Nevertheless, I do not believe that this interest, standing alone, is sufficient to overcome the other *Westinghouse* factors, which in this case weigh largely in Doe's favor. Moreover, in my view, the majority places a disproportionate emphasis on factor seven, so much so that the remaining elements of the balancing test become practically irrelevant to its analysis. To my knowledge, we have never suggested that the seventh *Westinghouse* factor is the most significant consideration in our analysis. Accordingly, because under the highly deferential *Parkway Garage* standard there clearly is sufficient evidence in the record to support the jury's verdict

in favor of Doe, once again I believe we are bound to affirm the district court's order.

Finally, I am concerned that the majority's decision on the issue of SEPTA's liability appears to be influenced, at least in part, by the fact that Doe was neither fired, harassed nor demoted. (*See* Maj. Op. at 13 ("This potential for harm, however, should not blind us to the absence of harm in this case.")). I do not understand how or why this point is at all relevant to our legal analysis of the liability issue. In my view, the nature and extent of harm Doe suffered as a result of the disclosure that occurred is a damages rather than a liability issue. Moreover, as I understand the logic of the majority position, even if Doe had suffered a more direct harm in this case (say, for instance, on the job harassment), SEPTA's actions still would not have constituted a violation of Doe's limited privacy right against disclosure, because this right was outweighed by the strong public interest favoring SEPTA's access to prescription drug information for auditing purposes. Again, I disagree.

But I am particularly troubled by the potential implications of the majority's position. I hope I am wrong, but I predict that the court's decision in this case will make it far easier in the future for employers to disclose their employees' private medical information, obtained during an audit of the company's health benefits plan, and to escape constitutional liability for harassment or other harms suffered by their employees as a result of that disclosure.

For the above reasons, I respectfully concur and dissent.

A True Copy:
Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John Doe, a SEPTA Employee, Plaintiff	:	
v.	:	Civil No.
Southeastern Pennsylvania Transportation Authority and Judith Pierce, Individually and in her official capacity, Defendants	:	93-5988

MEMORANDUM

Yohn, J. June 1, 1995

John Doe, an employee of the Southeastern Pennsylvania Transportation Authority ("SEPTA"), brought this action for violations of his civil rights by his employer and by Judith Pierce, a SEPTA official. The suit arose from an incident in November 1992, in which Pierce and other SEPTA officials learned that Doe was being treated for HIV-related illness. After a week-long trial, the jury returned a verdict against both defendants and awarded damages in the amount of $125,000. Presently before the court are the defendants' post-trial motions.

The defendants have moved for judgment as a matter of law or, in the alternative, for a new trial under Federal Rule of Civil Procedure 50(b), and by separate motion have also moved for reduction of damages or, in the alternative, for a new trial ("remittitur"). Because Doe failed to present sufficient evidence to sustain his failure to train claim, SEPTA will be granted judgment as a

matter of law on that issue; further, the court will conditionally grant SEPTA a new trial on the failure to traim [sic] claim (in accord with the dictate of Federal Rule of Civil Procedure 50(c)(1)). The court will reject the defendants' other asserted grounds for judgment as a matter of law or a new trial on liability, including lack of evidence of damages; accordingly, the defendants' first motion will be denied in all other respects. As to the defendants' remittitur motion, the court will conclude that a reduction in the damages award is not appropriate; accordingly, the remittitur motion will be denied in its entirety.

I. PROCEDURAL HISTORY

Pierce learned Doe's HIV status through reviewing information on the utilization of SEPTA's prescription benefit plan in connection with her position at SEPTA. Before trial, Doe withdrew all but three counts of his complaint; these three counts were claims via 42 U.S.C. § 1983 (1988) for deprivations of Doe's constitutional right to privacy, his right to procedural due process under the Fourteenth Amendment and his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments. On the defendants' motion, the court granted summary judgment to the defendants on the procedural due process claim; early in the trial, Doe withdrew the Fourth Amendment claim. Consequently, the only remaining basis for recovery at trial was deprivation of Doe's constitutional right to privacy. Under the rubric of the constitutional right to privacy, Doe presented three alternative theories for relief: 1) against Judith Pierce individually, as a person acting under color of state law; 2) against SEPTA by virtue of its

policy regarding the prescription reports, predicated upon Pierce's status as a policymaker for SEPTA in this area; and 3) against SEPTA for failure to train its employees properly regarding the privacy issues involved in handling sensitive prescription information. After a week-long trial, the jury returned a verdict against both defendants and awarded damages in the amount of $125,000. After a jury verdict, the court cannot substitute its view of the evidence for that of the jury; accordingly, all evidence and inferences therefrom must be taken in the light most favorable to the verdict winner. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691-92 (3d Cir. 1993) (as amended on petition for rehearing). The following recitation of the facts conforms to this principle.

II. FACTS

Beginning in 1990, Pierce was SEPTA's Chief Administrative Officer. (Tr. 11/30/94 at 150.)[1] Early in her tenure, she was made responsible for reducing the cost of benefits for SEPTA. (Tr. 11/29/94 at 123, 130; Tr. 12/1/94 at 177). Doe has been employed by SEPTA since 1988 as manager of SEPTA's employee assistance program. At the time of the events at issue, he was HIV-positive; by the time of trial, he had developed AIDS. In April of 1991,

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[1] The trial transcript, which is comprised of separately paginated volumes for each day's testimony, shall be cited as "Tr." followed by the date of testimony and the page on which the relevant testimony appears.

Doe was prescribed AZT, an anti-viral drug used exclusively to treat HIV illness, under the brand name Retrovir. (Tr. 12/2/94 at 26-28.) Before he filled his prescription, he asked his supervisor, and head of SEPTA's Medical Department, Dr. Richard Press, whether anyone audited the prescriptions filled under SEPTA's benefits plan in such a way that people's names were associated with the drugs they were taking. (*Id.*) Press stated that he had on occasion been asked to look at prescription records when someone was suspected of abusing a narcotic, but that otherwise the prescription records were not examined in such a way that names were associated with drugs or diagnoses. (*Id.* at 26-27, 137.) Thus reassured, Doe filled his prescriptions for medications used solely for treating HIV infection through the SEPTA prescription benefit plan, even though he had other alternatives. (*Id.*)

On September 1, 1992, SEPTA made Rite Aid its vendor for all its prescription benefits. (Tr. 11/30/94 at 172.) In September of 1992 Doe filled his prescriptions at a Rite Aid pharmacy and used the SEPTA prescription benefit plan. Under its contract with SEPTA, Rite Aid was obligated to provide SEPTA with utilization reports for its prescription drug program. (*Id.* at 204-05.) On November 13, 1992, Joel Feldman of Rite Aid delivered the first series of reports to SEPTA; these reports were formatted in Rite Aid's standard format. (*Id.* at 204-05, 234.) One report in particular included employee names and the drugs they were prescribed as well as the cost of the

prescription and the date it was filled.[2] Pierce reviewed the Rite Aid reports with Jacob Aufschauer, Director of Benefits for SEPTA, in the presence of Joel Feldman. (Tr. 11/29/94 at 119-20, 146; 11/30/94 at 207; 12/1/94 at 96, 142.) As Pierce examined these reports, she noted the names of drugs she did not recognize and looked them up in a copy of the Physicians' Desk Reference, or PDR. (Tr. 11/29/94 at 182.) She then called Dr. Louis Van de Beek, another SEPTA employee, to identify the drugs she could not find in the PDR. (*Id.* at 183, 190, 217-18.) At least some of the drugs she called about were HIV-specific medications taken by Doe; through her review of the utilization reports, Pierce learned that Doe was HIV-positive. (*Id.* at 228, 234-35, 237.) From Pierce's questions, Van de Beek concluded that she was asking about Doe's medications specifically, because Van de Beek knew that Doe was taking a particular drug to treat HIV which had only recently come on the market and which Pierce wanted identified. (Tr. 11/29/94 at 241; 11/30/94 at 33-40.) When Van de Beek suggested to Pierce that what she was doing might be improper, Pierce directed him not to question her and not to speak of the conversation to anyone. (Tr. 11/29/94 at 238-41; 11/30/94 at 35-37.) Shortly after their review of the reports took place, Pierce and Aufschauer decided that names ought to be omitted from all future Rite Aid reports. (Tr. 11/30/94 at 134, 215.)

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[2] Pierce testified that this report was titled "At a cost of a Hundred Dollars or More, Utilization of Drugs by Subscriber at a Cost of a Hundred Dollars or More By Dispense Date." (Tr. 12/30/94 at 136.)

However, before it was destroyed, Pierce showed the report with Doe's name and medications on it, which indirectly revealed that he was HIV-positive, to Press, SEPTA's medical director and Doe's direct supervisor. (Tr. 11/29/94 at 247-48; 11/30/94 at 80-81, 97, 101-03; 12/1/94 at 5, 10.) Pierce asked Press whether he could perform an audit of the utilization of the prescription benefit plan based upon the information on the report. (11/30/94 at 80-81, 99; 12/1/94 at 10.) It appeared to Press that Pierce had highlighted or otherwise marked certain lines on the report (including the employee's name and medication). (Tr. 12/1/94 at 5-6.) Press testified that HIV-specific medications were marked. (*Id.* at 8-9.) Press further testified that Pierce asked him if he knew any of the individuals whose names were highlighted and whether any of these individuals were HIV-positive. (*Id.* at 11-13.) Press saw Doe's name on the report; Pierce then initiated a conversation about Doe's suffering from AIDS. (11/30/94 at 101-02; 12/1/94 at 13-14.) In response to Pierce's query about performing an audit, Press expressed discomfort at the presence of names on the report and indicated that he had neither the expertise nor the resources to perform such an audit. (11/30/94 at 99-100; 12/1/94 at 15-16.) After his conversation with Pierce, Press went immediately to James Kilcur, SEPTA's General Counsel. (Tr. 12/1/94 at 19.) Press expressed his concern about the presence of names on the prescription report and about what he considered confidential medical information leaving the Medical Department. (Tr. 12/1/94 at 21-22, 150-51.) Kilcur spoke to Pierce about the need for the names on the prescription report. (Tr. 11/30/94 at 115-16; 12/1/94 at 154.) Pierce told Kilcur

that the names were unnecessary at that stage of examining the prescription report. (Tr. 12/1/94 at 155.) After Pierce's conversation with Press, the particular report at issue was destroyed, and Rite Aid was instructed to format all future prescription benefit utilization reports without names. (Tr. 11/30/94 at 134; 12/1/94 at 99.)

After his conversation with Pierce, Van de Beek told Doe that he had received a telephone call from Pierce and that she appeared to be reading from a list of Doe's medications; Van de Beek also told Doe that he had concluded that as a result of the conversation, Pierce now knew that Doe was HIV-positive. (Tr. 11/29/94 at 241; 11/30/94 at 33-40; 12/2/94 at 11-13.) Van de Beek was aware of the medications that Doe was taking because they had discussed it previously, as Van de Beek had some expertise regarding AIDS. (Tr. 11/30/94 at 36-37; 12/2/94 at 36.) Doe, who specifically did not wish Pierce to know he was HIV-positive, was upset to discover that Pierce had acquired this information. (Tr. 11/30/94 at 36; 12/2/95 at 65-66.) Doe then went to Press with his concern that Pierce now knew. (Tr. 12/2/94 at 78.) Press told Doe that Pierce had asked him to audit a list of prescriptions which contained employees' names and which had HIV medications, including Doe's, highlighted. (Tr. 12/1/94 at 25-27, 43-44, 46; 12/2/94 at 78-80.) Doe was even further upset by this information. (*Id.* at 80.)

III. JUDGMENT AS A MATTER OF LAW

The defendants seek judgment as a matter of law or, in the alternative, a new trial. In *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 113 (3d Cir.), *cert. denied*, 484

U.S. 853 (1987), the court reviewed the applicable standards:

> A judgment N.O.V. may be granted under Rule 50(b), F.R.Civ.P., "only if, as a matter of law, 'the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief.' " *Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96, 101 (3d Cir. 1977).

More recently, the Third Circuit outlined the relevant standard this way:

> In deciding whether to grant a motion for JNOV, the trial court must view the evidence in the light most favorable to the non-moving party, and determine whether the record contains the "minimum quantum of evidence from which a jury might reasonably afford relief." *Keith v. Truck Stops Corp.*, 909 F.2d 743, 745 (3d Cir. 1990) (citations omitted). The court may not weigh the evidence, determine the credibility of witnesses or substitute its version of the facts for that of the jury. *Blair v. Manhattan Life Ins. Co.*, 692 F.2d 296, 300 (3d Cir. 1982). The court may, however, enter judgment notwithstanding the verdict if upon review of the record, it can be said as a matter of law that the verdict is not supported by legally sufficient evidence. *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826 [(1970)].

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691-92 (3d Cir. 1993).

Federal Rule of Civil Procedure 50(b) expressly provides that a motion for a new trial may be joined with a post-trial motion for judgment as a matter of law. Fed. R. Civ. P. 50(b). "The authority to grant a new trial . . . is

confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam), *cited in, American Bearing Co. v. Litton Indus. Inc.*, 729 F.2d 943, 948 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984). The court may grant a new trial "if required to prevent injustice or to correct a verdict that was against the weight of the evidence." *Id.* (citing *Thomas v. E.J. Korvette, Inc.*, 476 F.2d 471, 474-75 (3d Cir. 1973)). However, in deciding whether to order a new trial, the court must guard against substituting its own judgment of the facts and the credibility of the witnesses for that of the jury. "[T]he district court ought to grant a new trial on the basis that the verdict was against the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). *See Olefins Trading, Inc. v. Han Yang Chem Corp.*, 9 F.3d 282, 289-90 (3d Cir. 1993) (purpose of "miscarriage of justice" standard for new trial is "to ensure that the trial court does not supplant the jury verdict with its own interpretation of the facts"); *see also Shanno v. Magee Indus. Enters.*, 856 F.2d 562, 567 (3d Cir. 1988).

IV. DISCUSSION

Doe brought, in essence, three separate § 1983 claims for violation of his constitutional right to privacy.[3] First,

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[3] Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

he asserted and presented evidence that Pierce individually acted to violate his constitutional right to privacy and that therefore she was liable to him. Second, Doe asserted and presented evidence that Pierce's actions also subjected SEPTA to § 1983 liability based upon her status as a policymaker for SEPTA.[4] These two theories will be

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> or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

[4] Section 1983 liability cannot be predicated upon the doctrine of respondeat superior. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). SEPTA is treated like a municipality for § 1983 purposes, and may be liable for its own actions. *See Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 832 (3d Cir. 1991) (in banc) (by analogy to *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) regarding municipal liability, the court held that, like a municipality, SEPTA is not subject to punitive damages under § 1983), *cert. denied*, 504 U.S. 943 (1992). A municipality may be liable for constitutional violations which result from its policies. *Monell*, 436 U.S. at 691 (no municipal § 1983 liability "unless action pursuant to official municipal policy of some nature caused a constitutional tort"). However, a single decision by a person with policymaking authority over the issue in question can create municipal, or SEPTA, policy and subject the municipality, or SEPTA, to liability under § 1983. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). SEPTA does not contest that Pierce had policymaking authority at SEPTA and that her decisions and actions regarding the prescription benefit utilization report, and Doe's prescription information in particular, created SEPTA policy on these issues. Hence, if Pierce's actions violated Doe's constitutional rights, then SEPTA policy also caused that constitutional violation and SEPTA is also liable.

discussed jointly. Third, Doe asserted and presented evidence that SEPTA was independently liable for its own failure to train its employees properly regarding the restrictions the constitutional right to privacy places upon their actions. As the failure to train claim is subject to different requirements, it will be treated separately.

A. Pierce Individually and as SEPTA Policymaker

1. Constitutional Status of Prescription Information

Doe's claims against Pierce individually and as a SEPTA policymaker asserted that her actions with regard to the Rite Aid report violated Doe's constitutional right to privacy. As the court explained in its memorandum disposing of the defendants' motion for summary judgment, the constitutional right to privacy as defined by the Supreme Court protects "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977); *accord Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 109 (3d Cir. 1987) (*F.O.P.*) (quoting *Whalen*); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (also quoting *Whalen*). Initially, the court must determine whether particular information is a "private matter" protected by the constitutional privacy right. *F.O.P.*, 812 F.2d at 112. The Third Circuit has noted that "[t]he more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Id.* at 112-13. In *Westinghouse* the court stated that "[t]here can be no question that an employee's medical records, which may contain intimate facts of a personal

nature are well within the ambit of materials entitled to privacy protection." *Id.*

The defendants direct their first argument to this stage of the analysis.[5] The contend that the court erroneously held and instructed the jury that as a matter of law the prescription information at issue in this case was protected by the constitutional right to privacy. The section of the charge containing the challenged instruction is set out at some length in the margin.[6] In *F.O.P.* the Third

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[5] The defendants raise this issue at footnote 20 of their memorandum of law in support of this motion. In this footnote, the defendants state that they made an exception to the jury charge on the record and reiterate that exception. No further argument is offered; their apparent intent is to preserve the issue for appeal. As the court recalls, and its contemporaneous notes confirm, at the charge conference, defense counsel agreed to the charge now called objectionable. Counsel then vaguely raised this issue on the record in his Rule 50 motion at the close of the evidence. (Tr. 12/2/94 at 159-60.) Inexplicably, he also stated during his closing that "No one denies that one's medical diagnosis, and especially one as serious a condition as Mr. Doe has, is a confidential matter." (Tr. 12/5/94 at 56.) Without benefit of any further defense argument, the court addresses the issue even though the court considers it to have been waived.

[6] The relevant portion of the court's charge to the jury was as follows:

> Now, then you go on to consider the first element. And that is whether or not the defendants performed acts which operated to deprive the plaintiff of his constitutional right not to have his privacy invaded. And let me explain this concept to you and the definitions that the courts have given to it because this, obviously, is the heart of your discussion with reference to, that is whether there was an invasion of this right of privacy. The constitutional right to

Circuit's held that question 19 in the questionnaire at issue, which asked: "Are you presently using any prescription drugs? If yes, state the drug, the need for it and the dosage," among other medical information questions, implicated the plaintiffs' constitutional privacy rights. *Id.* at 113. The court cited, *inter alia, Whalen v. Roe,* 429 U.S.

> privacy has been defined as the right to be let alone. It is invaded when the Government impinges on an individual's interest in avoiding disclosure of a personal matter. Under the United States Constitution, an individual's prescription records indicating that he or she is taking prescription drugs whose only use is to treat HIV virus or AIDS is a personal matter entitled to privacy from the Government under the Constitution. So that basically what we're saying is that an individual has a right of privacy with reference to prescription drugs of this nature. There may be a right to privacy in other prescription drugs or other medical information, but in terms of this case, we're dealing with the prescription drugs dealing with HIV and/or AIDS.
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> Now, plaintiff's theory of recovery is that the defendants deprived him of this constitutional right to privacy. The right of privacy, however, is not absolute. It doesn't answer the question just because he has a protected interest in this prescription information. Instead, the disclosure of personal information is permissible where the Government, that is SEPTA's, interest in discovering or disclosing personal information outweighs the individual's privacy interest. In other words, you must evaluate whether SEPTA's interest in having this information outweighs the plaintiff's interest in keeping it confidential.

(Tr. 12/5/94 at 89-91 (minor transcription errors corrected by the court).)

589, 599-600 (1977), *In re Search Warrant (Sealed)*, 810 F.2d 67 (3d Cir.), *cert. denied*, 483 U.S. 1007 (1987), and *United States v. Westinghouse*, 638 F.2d 570, 577 & n.5 (3d Cir 1980), as recognizing the constitutionally protected status of medical information. 812 F.2d at 113. In addition to these cases recognizing the constitutionally protected status of prescription information, at least one court within the Third Circuit has held that an AIDS diagnosis is similarly protected. *Doe v. Borough of Barrington*, 729 F.Supp. 376, 382 (D.N.J. 1990) (finding that "the Constitution protects plaintiffs from governmental disclosure of their husband's and father's infection with the AIDS virus").

To determine whether particular information was protected, the Third Circuit looked at whether the information sought was "within an individual's reasonable expectations of confidentiality." *F.O.P.* 812 F.2d at 112. Given that certain prescription medications are used exclusively to treat HIV infection, the information that someone is taking such drugs clearly reveals his or her diagnosis. Particularly in view of the hysteria surrounding HIV and AIDS at the time of the events in question, *see generally Doe*, 729 F.Supp. at 380-81, and Doe's documented efforts to keep the information confidential, the court affirms its prior holding that, under the standards set forth by the Supreme Court and the Third Circuit, the information contained in the prescription benefit utilization report, linking Doe's name with HIV-specific medications, was well within his reasonable expectations of confidentiality and thus was protected by the constitutional right to privacy. In other words, this information was a "private matter" into which the government, here

Pierce and SEPTA, could not intrude without sufficient cause.

2. Violation of the Constitutional Right to Privacy

If the government is to intrude into such protected information, the Third Circuit has indicated that a balancing test must be applied to determine whether the government's interest in access to the information outweighs the individual's interest in keeping the matter private; if not, the intrusion violates the constitutional right to privacy. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980), *cited in*, *F.O.P.*, 812 F.2d at 110. In *Westinghouse*, the Third Circuit listed seven factors to be considered in this balancing test:

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

638 F.2d at 578. Having found that Doe had established genuine issues of material fact with regard to the application of these factors in this case, the court denied summary judgment to the defendants. At trial, the application of the *Westinghouse* factors was a question of fact for the

jury; the court read the *Westinghouse* factors twice to the jury as part of the charge. (Tr. 12/5/94 at 91, 97.)

Defendants argue that Doe failed to present sufficient evidence to permit a reasonable jury to conclude that Pierce violated his constitutional right to privacy. They read the case law to require a disclosure of the protected information "outside the need-to-know" in order for a constitutional violation to exist and argue that no such disclosure was made. In support of this supposed requirement, the defendants cite only *Whalen v. Roe*, 429 U.S. 589 (1977). *Whalen* concerned a facial challenge to a New York statute requiring that prescriptions for certain legal but dangerous drugs be written and filled on a particular form and a copy sent to a central repository. *Id.* at 591. The information on record with the state Department of Health included the patient's name, age and address, the drug prescribed, the dosage, and the names of the physician and pharmacist. *Id.* at 593. The Court upheld the validity of the statute, reasoning that the tight security provisions were sufficient to survive a facial challenge.[7] *Id.* at 600-01. The Court found little danger of

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[7] The Court described the security precautions involved in the New York system:

> The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line," which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation. Willful violation of these prohibitions is a crime

public disclosure of the prescription information and held that the compelled disclosures to employees of the New York Department of Health were "not meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." *Id.* at 602. The Court held that "[r]equiring such disclosures to representatives of the State having responsibility for the health of the community does not automatically amount to an impermissible invasion of privacy." *Id.*

Among the unpleasant invasions of privacy to which the court referred in dictum were "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies." *Id.* The defendants reason that because SEPTA's prescription benefit program was self-insured,[8] SEPTA, like an insurance company, was entitled to the prescription information in whatever form. The defendants contend that *all* SEPTA officials with responsibility for negotiating the overseeing the Rite Aid contract were in the "need-to-

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punishable by up to one year in prison and a $2,000 fine.

Id. at 594-95.

[8] From the testimony at trial, it appears that SEPTA paid Rite Aid a premium per covered employee per month; SEPTA employees were required to purchase their prescriptions at a Rite Aid or Rite Aid-affiliated pharmacy. At the end of the year, if the cost of the total prescriptions filled was less than 91% of the total premiums paid, SEPTA would receive a refund, and if the total cost was more than 114% of the premiums paid, SEPTA would owe a penalty. (Tr. 11/29/94 at 120-21.)

know with regard to the prescription information, including reports which associated the employees' names with particular drugs. Finally, the defendants conclude that because no one outside this "need-to-know learned of Doe's illness, no constitutional violation occurred.

While the *Whalen* Court did recognize that the reality of modern health care involves dissemination of otherwise private medical information, the Court did not hold that as a result the constitutional right to privacy placed no limitations on the fate of that information once disclosed by the patient to the pharmacist in the course of purchasing prescription medications. Instead, the *Whalen* Court relied on the substantial security precautions included in the New York statute, including the criminal penalties associated with public disclosure of the patients' identities, to conclude that the likelihood of disclosure of constitutionally protected information was insufficiently great to warrant declaring the entire statutory scheme unconstitutional. *Id.* at 600-01. *Whalen*, contrary to the defendants' protestations, does not stand for a broad privilege for those government officials with the "need-to-know" protected information. The seven-factor test enunciated by the Third Circuit in *Westinghouse*, decided after *Whalen*, remains the best guidance for this court, and the jury, determining whether a violation of the constitutional right to privacy occurred.

Furthermore, even using the defendants' "need-to-know" analysis, the evidence supports a reasonable jury finding that a constitutional violation occurred. It was undisputed that the names on the report were unnecessary for Pierce's review of the Rite Aid report and that knowing this, she nevertheless continued to look at the

report, and that as a result, Doe's diagnosis was disclosed to her. Similarly, there was no need for Aufschauer to know Doe's name and medications as disclosed to him as a result of his assisting Pierce in reviewing the Rite Aid report. Lastly, there was no reason for Press to know Doe's name and medications as disclosed to him when Pierce showed him the marked up page of the report which contained that information. None of these people had a business need to know the names contained in that report. Accordingly, Pierce's use of that report, without covering or obliterating the names, violated Doe's constitutional right to privacy.[9]

Next, the defendants contend that Doe presented insufficient evidence for a reasonable jury to find that a constitutional violation occurred using the *Westinghouse* factor analysis. It is not the place of the court to substitute its judgment for that of the jury with regard to the outcome of the *Westinghouse* balancing analysis; rather, the court must ascertain whether Doe presented sufficient evidence for a reasonable jury to find in his favor under *Westinghouse*. Upon review of the trial transcripts, the court concludes that he did. First, there was evidence that the "type of record requested" was prescription utilization data; furthermore there was evidence that the actual record *received* was a report which listed employees' names on a line with the medications they were taking.

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[9] As noted in the memorandum disposing of defendants' motion for summary judgment, the fact that Press and Aufschauer already knew that Doe was HIV-positive goes to the extent of his damages not to the constitutionality of Pierce's conduct.

The jury reasonably could have found that it was possible to learn Doe's diagnosis from the information contained in the prescription benefit utilization report. Pierce testified that she did learn his condition in that manner, and both Press and Aufschauer testified that she pointed out Doe's name to them and that they knew what the drugs Doe was taking were used for. (Tr. 11/29/94 at 234-35, 237; 12/1/94 at 11-13, 96-97.) The jury could clearly find that such linking of names with drugs, which in turn inevitably reveals diagnoses, weighs heavily in favor of the individual privacy interest here.

Second, "the information it does or might contain" was the fact that Doe was HIV-positive and receiving treatment for HIV-related illness. There was evidence that Doe made efforts to limit the people who had access to this information, as demonstrated by his 1) telling only four carefully chosen people he worked with at SEPTA and 2) investigating whether using the SEPTA prescription plan would reveal his illness to others. The third *Westinghouse* factor is "the potential for harm in any subsequent nonconsensual disclosure." The court has already taken notice of the extremely sensitive nature of this information in view of the hysteria surrounding HIV and AIDS at the time. The jury could reasonably find that both of these factors also weigh in Doe's favor. Fourth, the jury considered "the injury from disclosure to the relationship in which the record was generated." This factor addresses Doe's relationship with SEPTA, rather than his relationship with Rite Aid, which was unaffected. The parties did not dispute that Doe suffered no official negative employment consequences as a result

of the disclosure of his condition to Pierce, et al. However, Doe testified that he was concerned that Pierce might have a personal problem with people with HIV or AIDS and was worried about what her reaction to the information might be. Because the court is required to take all inferences in favor of the verdict-winner, this factor weighs, albeit lightly, in Doe's favor. The fifth *Westinghouse* factor is "the adequacy of safeguards to prevent unauthorized disclosure." There was evidence that apart from locks on office doors and filing cabinets, there were *no* safeguards to prevent the unauthorized disclosure of prescription information. However, there was also evidence that the particular report at issue was destroyed immediately after Pierce learned that Doe was HIV-positive and that Rite Aid was directed to omit names from future reports. The jury could find that this factor weighed in favor of either side.

Sixth, the jury considered the "need for access." Pierce testified at length regarding her purposes in reviewing the utilization report: she was examining the reports in general for format to see whether Rite Aid was providing SEPTA with the information it needed to monitor the prescription program; she was looking for a total expense for that first month as an early indication of whether the contract SEPTA had entered into with Rite Aid would result in money back for either side; she wanted to determine whether the computer system which Rite Aid had developed for this program was meeting Rite Aid's commitment to reduce fraud and abuse of the benefit; lastly, Pierce was checking on Rite Aid's ability to steer employees towards acceptable generic drugs over brand names. (Tr. 11/29/94 at 120-22, 185-86.) In all her

testimony, however, Pierce never articulated a need to know what Doe's medications were used for or a reason that she did not put the report aside or black out the names when she saw them, knowing as she did that the report would tell her those employees' illnesses. Furthermore, there was testimony from Pierce and Aufschauer that the names of the individual employees were irrelevant to the issues they were examining. (*Id.* at 186-87; 12/1/94 at 100.) Several witnesses testified that the names were in fact removed from subsequent Rite Aid reports regarding the prescription benefit program. (*Id.* at 99.) Implicitly, and explicitly, the defendants admitted that they did not need the names. The jury could reasonably find that this factor weighed in Doe's favor.

Lastly, the jury considered "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." In the absence of a statute or articulated public policy, the defendants presented evidence of their interest in preserving the public fisc by controlling SEPTA's costs for its prescription benefit program. The financial need to control prescription benefit costs, however, does not include a need to have the names of employees linked with their medications, at least until an abuse of the benefit has been established. The jury could find that this factor also weighed in Doe's favor. The court concludes that with this information before it, the jury could have taken all of the *Westinghouse* factors into account and weighed SEPTA's interest in having the information in the form it did and in using it in the way it did against Doe's privacy interest in the information and reasonably could have concluded that a constitutional violation

occurred. Furthermore, the court concludes that, as to this issue, the jury's verdict was not against the weight of the evidence.

B. State of Mind

The defendants' next line of attack on the jury's verdict is to argue that there was insufficient evidence for the jury to conclude that Pierce acted with the requisite state of mind to establish liability under any of Doe's theories. Section 1983, in and of itself, contains no state of mind requirement. *Parratt v. Taylor*, 451 U.S. 527, 534-45 (1981); *see Daniels v. Williams*, 474 U.S. 327, 330 (1986) (adhering to this aspect of *Parratt*). However, the particular constitutional violation alleged to cause a "deprivation" under § 1983 may have a state of mind requirement. *Id.* ("[I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim.") In *Daniels*, the Court set a lower bound for the required state of mind by overruling *Parratt* "to the extent that it state[d] that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Id.* at 330-31. Thus, simple negligence is insufficient to state a claim under § 1983.

1. Pierce Individually and as a SEPTA Policymaker

The state of mind required to state a claim for deprivation of the constitutional right to privacy is unclear

because in the seminal cases on this issue, the defendants acted intentionally. *See, e.g., Whalen*, 429 U.S. at 591 (facial challenge to statute compelling disclosure of protected information); *F.O.P.*, 812 F.2d at 107 (§ 1983 action for injunction against use of questionnaire compelling disclosure of protected information); *Westinghouse*, 638 F.2d at 572 (challenge to National Institute for Occupational Safety and Health subpoena of employee medical records). The parties in this case agreed to an instruction which permitted the jury to find liability if Pierce acted intentionally, recklessly or with deliberate indifference to Doe's constitutional right to privacy. The defendants now argue that the jury had insufficient evidence to find that Pierce acted with deliberate indifference.[10]

The use of the term "deliberate indifference" requires an explanatory digression. It is important to clarify that this term has been used by the Supreme Court in two distinct senses, both of which are applicable to this case. The first sense of the term deliberate indifference is the mental state required to establish certain constitutional deprivations. *E.g., Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (deliberate indifference must be shown to establish violation of Eighth Amendment). With regard to Doe's claim against Pierce (and his parallel "policymaker" claim

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[10] The defendants do not take issue with whether there was sufficient evidence for the jury to find that Pierce acted either intentionally or recklessly. Since either of these mental states would establish liability by agreement, the entire discussion of the deliberate indifference standard by defendants is superfluous.

against SEPTA),[11] deliberate indifference is one of the possible mental states which triggers liability. The second sense of the term deliberate indifference is a description of the threshold showing for municipal liability for failure to train. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). In *City of Canton*, the Court held that the inadequacy of training of municipal employees "may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom [they] come into contact." *Id.* Thus, with regard to Doe's failure to train claim, deliberate indifference is the threshold of SEPTA's liability.[12] The *City of Canton* Court implicitly acknowledged the dual meaning of deliberate indifference: "The 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." 489 U.S. at 388 n.8; *see Collins v. City of Harker Hts.*, 503 U.S. 115, 124 (1992) (describing dual sense of term "deliberate indifference").

To cloud these already muddy waters further, the defendants confuse the standard of deliberate indifference with that of qualified immunity. The defendants cite this court's opinion in *Savacool v. Delaware County Health Dep't of Mental Health & Mental Retardation*, No. 92-2142, 1992 WL 391393, at *2 (E.D. Pa. Dec. 16, 1992):

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[11] See *supra*, note 4, for an explanation of Doe's "policymaker" claim.

[12] Hence, with regard to the failure to train claim, it is the deliberate indifference of those SEPTA policymaking officials concerned with training that is at issue.

"Negligence on the part of officials of a state or municipality, acting in their official capacity, is not enough to overcome their qualified immunity under § 1983. There must be something akin to deliberate indifference or intention to harm." From this statement, the defendants argue that deliberate indifference "requires awareness on the part of a state official of acting contrary to clearly established legal principles." (Ds' Mem. in Supp. of M. for Jmt, as Matter of Law at 23.) This requirement is derived from the qualified immunity standard outlined in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, the defendants attempt to "bootstrap" from this court's statement in *Savacool* that allegations of negligence are insufficient to overcome a motion to dismiss on qualified immunity grounds, to the conclusion that deliberate indifference and qualified immunity are to be judged by the same standard. The defendants cite no decision in which a court has adopted such a formulation. This court will not be the first. The body of law surrounding § 1983 is sufficiently complicated without such a conflation of the plaintiff's burden of pleading and proving that the defendant acted with the required mental state with the defendant official's burden of pleading and proving the affirmative defense of qualified immunity.

On March 27, 1995, the court issued an order asking the parties to brief the issue of whether Pierce had waived the issue of qualified immunity and, if not, whether she is thereby protected from liability in this action.[13] Despite the court's invitation to do so, even after

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[13] Only Pierce may be protected by qualified immunity. *See Siegert v. Gilley*, 500 U.S. 226, 231 (1991) ("Qualified immunity is

the conclusion of the trial, defendant Pierce does not assert an affirmative defense of qualified immunity. Instead the defendants reiterate their argument discussed above and maintain that Doe failed to present evidence to establish deliberate indifference, defined by analogy to the qualified immunity cases as requiring subjective knowledge that an act will violate constitutional protections. Because Pierce has not asserted a qualified immunity defense, the court will not consider the merits of such a defense. In addition, having rejected the defendants' argument that deliberate indifference may be defined by analogy to qualified immunity, the court will now return from its digression and consider whether Doe presented sufficient evidence for a reasonable jury to decide that Pierce acted intentionally, recklessly or with deliberate indifference to his constitutional right to privacy.

Doe presented evidence that Pierce knew that she might come across a name she knew on the Rite Aid report and that she saw Doe's name and medications on the report. (Tr. 11/29/94 at 12, 62.) Pierce testified that she felt that she had a right to look at all the information she was given by Rite Aid because SEPTA's prescription benefit program was self-insured.[14] (Tr. 11/29/94 at

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a defense that must be pleaded by a defendant official." (citing *Gomez v. Toledo*, 446 U.S. 635 (1980))).

[14] Pierce stated on direct examination:

A. I didn't – I didn't feel like I was restricted at all. What I was given it was a box. I was free to look at what I wanted to look at.

Q. Even if it contained the names of people and the drugs they were taking and –

194-95, 201.) There was evidence that Pierce knew that she was asking about Doe's medications in that Van de Beek testified that she was upset to learn that the drug she had asked about was used exclusively to treat HIV infection. (Tr. 11/30/94 at 36; 12/1/94 at 142.) Pierce further testified that she was not concerned that by asking Van de Beek about Doe's medications that she would be learning Doe's medical condition without his knowledge. (Tr. 11/29/94 at 223.) Aufschauer testified that Pierce pointed Doe's name out to him while they were reviewing the report. (Tr. 12/1/95 at 96-97.) Doe presented evidence in addition that the Rite Aid reports were voluminous, but that the individual report she showed Press was the one which contained Doe's name and medications. Moreover, there was evidence that Pierce had highlighted the report, including Doe's name and medications, before showing it to Press. Pierce testified that she knew from the expression on Press' face that he had seen Doe's name and had recognized his diagnosis. (Tr. 11/30/94 at 101-02.) Press testified that Pierce asked him whether he knew if Doe was being treated for AIDS. (Tr. 12/1/94 at 13-14.)

A. Yes.
Q. You know you didn't need –
A. Yes.
Q. To know it.
A. Yes.
(Tr. 11/29/94 at 194-95.)

First, from the testimony regarding Pierce's reaction to the use of Doe's medication, a reasonable jury could infer that she learned his condition intentionally, recklessly or with deliberate indifference to Doe's constitutional right to privacy in that she knew that she was asking about Doe's medications and that she would thereby learn his diagnosis. Second, because there was evidence that Pierce pointed out Doe's name to Aufschauer, and that he could see the report as she called and queried Van de Beek over a speakerphone, a reasonable jury could infer that Pierce caused Aufschauer to learn Doe's condition intentionally, recklessly or with deliberate indifference. Lastly, because Pierce knew that Press was Doe's direct supervisor and that he was a doctor who was likely to know what particular medications were used for, and because Pierce had the opportunity to use another individual report or to obliterate the names from the report she used, a reasonable jury was free to infer that Pierce disclosed Doe's condition to Press intentionally, recklessly or with deliberately indifference.[15] Accordingly, the court finds that Doe presented

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[15] The court notes that the defendants concur in this conclusion. In their Memorandum of Law in support of their Motion for Judgment as a Matter of Law, they state:

> Putting the facts in the light most favorable to Plaintiff, the most Plaintiff could have shown is: 1) Ms. Pierce, by her questions and highlighting, was curious about Mr. Doe's medical condition; 2) and, in the course of a confidential meeting over medical information, she discussed Doe by name and *intentionally disclosed his condition* to Dr. Press who in addition to being Medical Director was Mr. Doe's supervisor.

(D's Mem. in Supp. at 27 (emphasis added).) The defendants thus concede that Doe presented sufficient evidence for a

sufficient evidence of state of mind to succeed on his claim against Pierce individually and against SEPTA as a result of Pierce's status as a SEPTA policymaker. Further, the court concludes that a new trial on the issue of liability under these theories is not warranted as the verdict is not against the weight of the evidence.

2. Failure to Train

However, Doe's claim against SEPTA for failure to train its employees regarding the restrictions on their actions posed by the constitutional right to privacy stands on a different footing. Like Doe's policymaker claim, Doe's failure to train claim attempted to impose § 1983 liability on SEPTA directly. Because the doctrine of respondeat superior is unavailable in § 1983 cases, a municipality, or other governmental entity like SEPTA, is liable under § 1983 only "when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury." *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978). As noted above, the failure to train theory of § 1983 liability is based upon the Supreme Court's holding in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *See Fagan v. City of Vineland*, 22 F.3d 1283, 1292

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reasonable jury to find that Pierce acted with the requisite state of mind as to the disclosure to Press.

(3d Cir. 1994) ("The City is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the [high speed] pursuit in an unsafe manner and deprive the plaintiff of life or liberty."). The *City of Canton* Court reasoned that "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* at 389. The *City of Canton* Court acknowledged that "[i]t may seem contrary to common sense to assert that a municipality will have a policy of not taking reasonable steps to train its employees." *Id.* at 390. However, the Court went on to explain:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id. The Court indicated that a plaintiff could establish such failure-to-train liability in at least two ways: 1) by showing that the need for training is "so obvious" to city policymakers that failure to train amounts to deliberate indifference or 2) by demonstrating a series of similar deprivations which implicitly alerted the city policymakers to the need for training. *Id.* at 390 n.10. Doe presented no evidence of similar invasions of privacy; accordingly, his counsel argued that the need for some training was obvious, but none was provided.

After discussing *City of Canton*, the Third Circuit defined the elements of a failure to train claim in the context of a case concerning the suicide of a pretrial detainee in *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1029-30 (3d Cir. 1991):

> In a prison suicide case, this means that the plaintiff must (1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred, and (2) must demonstrate that the risk reduction associated with the proposed training is so great and so obvious that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to a deliberate indifference to whether the detainees succeed in taking their lives.

In *Colburn*, the plaintiff argued that a complete lack of training of jail personnel in identification of potential suicides among detainees violated the constitutional rights of plaintiff's decedent, who committed suicide while in custody. *Id.* at 1029. The court held that no municipal liability existed because the plaintiff did not identify particular training which would have enabled jail personnel to prevent plaintiff's decedent from killing herself. *Id.* at 1030. In this case, while the evidence presented by Doe at trial established that SEPTA employees like Pierce were not trained regarding the constitutional right to privacy, Doe completely failed to identify specific training that *should* have been provided, which would have prevented this invasion of privacy from taking place.

Furthermore, even assuming the existence of such alternative training, Doe did not demonstrate that the

reduction of risk of invasions of privacy thereby to be achieved was so great that SEPTA's policymakers' failure to establish such training amounted to deliberate indifference to the constitutional rights of SEPTA employees. While one way in which a plaintiff may establish deliberate indifference by government policymakers is to show that the need for training was obvious from the risk of constitutional violations, from the evidence presented at trial, it appears that Pierce's invasion of Doe's privacy was a unique event at SEPTA and that measures were taken after the fact to ensure that like invasions of privacy did not occur in the future. In *City of Canton,* the Court observed that "plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable." 489 U.S. at 391. This being the case, the jury was not free to infer from the fact that it had found that Pierce violated Doe's constitutional rights on this occasion that SEPTA's training in confidentiality was inadequate. Similarly, there was insufficient evidence for a reasonable jury to find that deliberate indifference by SEPTA's policymakers caused any inadequacy. Accordingly, the court will enter judgment as a matter of law in SEPTA's favor on this claim.

Pursuant to Federal Rule of Civil Procedure 50(c)(1), the court also conditionally rules in the alternative that should the judgment as a matter of law be reversed on appeal, a new trial should be held on SEPTA's liability for failure to train because the jury's verdict on the failure to train claim was against the clear weight of the evidence. A jury might possibly find that SEPTA ought to have known that reviewing its employees' prescription

records, even for legitimate business reasons such as monitoring benefits costs, could implicate the constitutional right to privacy. *Cf. City of Canton*, 489 U.S. at 388 n.10. However, a finding that Doe's injuries resulted from SEPTA's failure to train Pierce, Aufschauer, et al., in the constitutional right to privacy and that proper training would have prevented his injury, would be speculative on the evidence presented. Therefore, judgment in defendants' favor on the issue of a new trial regarding SEPTA's liability for failure to train will be granted in accordance with Federal Rule of Civil Procedure 50(c)(1).

V. DAMAGES AND REMITTITUR

As a basis for their motion for judgment as a matter of law, the defendants argue that Doe did not present evidence sufficient for a reasonable jury to award him any damages. While a jury may award nominal damages in a § 1983 action for a constitutional violation, the jury is not permitted to presume damages. In other words, "[t]here is no right to damages other than nominal ones for violation of a constitutional right unless actual injury is proven." *Bolden v. Southeastern Pa. Transp. Auth.*, 21 F.3d 29, 34 (3d Cir. 1994) (citing *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986)). Doe's asserted actual injury was his emotional distress at discovering that Pierce had learned that he was HIV-positive from his prescription information and his fear that she would further disseminate this highly sensitive and personal information or that negative employment consequences would result from the disclosure. Emotional distress is an actual injury for which a § 1983 plaintiff may recover, if such damages are proven. *See id.* A plaintiff is not required to

use expert testimony to prove emotional distress damages in a § 1983 action. *Id.* Doe's evidence in support of his claim for emotional distress damages consisted predominantly of his own testimony.

In seeking judgment as a matter of law, the defendants contend that a plaintiff's subjective impressions alone are an insufficient basis upon which to found a jury award for emotional distress damages. *See Nekolny v. Painter,* 653 F.2d 1164, 1172-73 (7th Cir. 1981) ("A single statement by a party that he was 'depressed,' 'a little despondent,' or even 'completely humiliated' (the latter in the context of explaining why other employment was not sought), is not enough to establish injury even when the statement is considered along with the facts of this case."), *cert. denied,* 455 U.S. 1021 (1982). The Court of Appeals for the Third Circuit, however, has expressly reserved the issue of whether emotional distress damages may be supported by the plaintiff's testimony alone. *Spence v. Board of Educ. of Christina Sch. Dist.,* 806 F.2d 1198, 1201 (3d Cir. 1986). Furthermore, the Seventh Circuit, which decided *Nekolny,* does not interpret its holding in the manner advocated by the defendants. In *United States v. Balistrieri,* 981 F.2d 916 (7th Cir. 1992), *cert. denied,* 114 S.Ct. 58 (1993), the court stated:

> *Nekolny* stand[s] for the principle that when the injured party provides the sole evidence, he must ably and sufficiently explain the circumstances of his injury and not resort to conclusory statements. This is not to say, however, that an injured person's testimony can never be sufficient by itself, or in conjunction with the circumstances of the particular case, to establish damages for emotional distress.

Id. at 931-32 (internal quotation marks and citation omitted). The court declines the defendants' invitation to create a requirement that a plaintiff present evidence in addition to his or her own testimony to prove emotional distress damages. The court concludes that there was sufficient evidence for a reasonable jury to find that Doe suffered actual injury as a result of the defendants' violation of his constitutional right to privacy. Accordingly, the court finds that the defendants are not entitled to judgment as a matter of law.

In the alternative, the defendants ask the court to order a remittitur, reducing Doe's damages to $0 and giving Doe the alternative of a new trial on the issue of damages. As defendants assert, an award for emotional distress damages may be remitted to nothing if the court is not satisfied that the plaintiff has proven "actual injury" and that the circumstances and/or the testimony presented establish "a reasonable probability, rather than a mere possibility, that damages due to emotional distress were in fact incurred." *Spence*, 806 F.2d at 1201, *quoted in*, *Bolden*, 21 F.3d at 33. In ruling on defendants' motion for judgment as a matter of law, the court has already concluded that the evidence supported a finding of actual injury; thus the next question is whether the evidence established a "reasonable probability" that Doe suffered emotional distress damages.

The Third Circuit has observed: "[I]t is the obligation of courts reviewing an allegedly excessive jury award to 'make a detailed appraisal of the evidence bearing on damages.' " *Rivera v. Virgin Islands Housing Authority*, 854 F.2d 24, 28 (3d Cir. 1988) (quoting *Gruenthal v. Long Isl. R.R. Co.*, 393 U.S. 156, 159 (1968)). As noted above, the

evidence bearing on damages in this case consisted almost entirely of Doe's testimony. He described his reaction when Van de Beek recounted his conversation with Pierce, and Doe learned that Pierce now knew of his illness:

> I'm sure the first thing I did was just to sort of stare blankly into the air. . . . I think at that point I was sort of in shock. And, you know, I just said, well, you know, why would she be doing this? What possible purpose could she have for this information. How could she have gotten it. . . . All I knew is that she called him and asked him, apparently, about my medications and then knew I had AIDS.

(Tr. 12/2/94 at 13.) Because Pierce merely asked Van de Beek questions without telling him why she wanted the information, at this point Doe did not know that Pierce was reviewing prescription benefit claims information; he only knew that she had a list of his medications. (*Id.*) Doe then described how he felt about the situation thereafter:

> I, I'm sure my, you know, people go through different reactions to, to, you know, insults and injuries of various sorts. And I know that after I left his office, I just went back to my office. It was getting on into the lunch hour and I didn't leave to go or anything. I just sort of sat in my office with the door closed and tried to gather my thoughts. And at some point in the afternoon I know I called my partner to tell him what I'd found out.

(*Id.* at 13-14.) Doe also testified that he was angry and frightened of what Pierce might do with the information.[16] (*Id.*..at 66.) The jury could have inferred that learning that Pierce knew of his illness was particularly upsetting to Doe because he had consciously decided that he did not want her to know. (*Id.* at 39-40).) He felt the Pierce was capricious and demonstrated a "marked lability in her emotion."[17] Doe testified that he perceived Pierce's attitude and behavior toward him to change after the incident.[18] He also testified that the attitudes and behavior of other people at SEPTA toward him changed after the incident, albeit subtly.[19] Doe is a trained psychologist. (*Id.* at 14.) When he recognized himself to be suffering from depression shortly after the incident, he

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[16] Specifically, Doe testified that he was concerned that a proposed expansion of his job duties would not take place, which it did not. He also testified that he was afraid he might be forced to stop seeing patients because of the hysteria regarding HIV-positive health care workers. Finally, he was afraid that he would be fired. (*Id.* at 66-67.)

[17] Doe explained that the term "labile" or "lability" meant, "in layman's terms, [that] she would be calm one moment and screaming at you the next, screaming obscenities." (*Id.* at 43.)

[18] Doe testified that Pierce canceled several scheduled meetings with him, three on one day, and that although she promised to visit him in the hospital while he was recovering from heart surgery, she did not. (*Id.* at 67-68.)

[19] Doe testified that Bob Birnbrauer asked him to assist with correspondence less often. He also recalled that whereas in the past when he supplied the office with homemade pastry, the entire cake would be eaten, after the incident part of his baked goods would remain. (*Id.* at 74-75.) Doe also stated that "the frequency of normal, you know, social chit chat is less" than previously. (*Id.* at 76.)

asked his physician to prescribe an anti-depressant medication, and the physician did so. (*Id.* at 77.)

Doe also testified to his reaction when Press told him that Pierce had asked Press to review a report which contained Doe's name and on which AIDS medications were highlighted. He testified to feeling "increasing confusion" regarding what was happening. Doe testified that he did not know what Pierce and SEPTA were doing, exactly what information they had, and for what purpose, that he had no control over events and that neither Pierce nor anyone else at SEPTA was telling him what was going on. (*Id.* at 80.) Subsequent to his discussions with Press, Doe's physician prescribed another anti-depressant in addition to his other medications. (*Id.* at 82.) Furthermore, Doe testified regarding the measures he took to maintain the privacy of his HIV status, namely, that he investigated whether it would be revealed by filling his prescriptions through SEPTA and that he had told only four coworkers about his illness in the three years he had worked at SEPTA prior to this incident. Based upon this testimony, the court readily concludes that Doe established a "reasonable probability" that he did indeed suffer emotional distress damages as a result of defendants' actions. Accordingly, the court will not order a remittitur of Doe's damages to nothing.

Now the court must turn to the more difficult part of the analysis: whether the $125,000 awarded by the jury was excessive and ought to be reduced to some other figure. The Third Circuit has stated:

> While a district court has discretion in determining whether a jury's verdict is excessive, it is undisputed that the court *may not* vacate or

> reduce the award merely because it would have granted a lesser amount of damages. For the court to disturb a jury verdict, "the damages assessed by the jury must be so unreasonable as to offend the conscience of the Court." *Murray v. Fairbanks Morse*, 610 F.2d 149, 152 (3d Cir. 1979).

Motter v. Everest & Jennings, Inc., 883 F.2d 1223, 1230 (3d Cir. 1989) (emphasis in original). In *Balistrieri*, the Seventh Circuit indicated that "in determining whether the evidence of emotional distress is sufficient to support an award of damages, we must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused that distress." 981 F.2d at 932. The circumstances of this case include the fact that these events occurred at a time when public knowledge regarding AIDS was limited, and AIDS hysteria was prevalent in the community. *See generally, Doe v. Borough of Barrington*, 729 F.Supp. 376 (D.N.J. 1990). In *Bolden* the Third Circuit upheld a $250,000 verdict in favor of a SEPTA employee who was subjected to an unconstitutional drug test. *Id.* at 33-34. The evidence held to be sufficient to support the award for emotional distress in that case consisted of the testimony of the plaintiff, two friends and plaintiff's wife and daughter regarding the impact of the drug test. *Id.* In this case the jury awarded half the amount upheld by the Third Circuit in *Bolden*.

As a result of the hyseria surrounding AIDS when this incident occurred, the impact of the defendants' invasion of Doe's privacy was greater than had Doe's illness been anything else; this was perhaps the most private information Doe possessed. Doe presented evidence that he made a sincere and concerted effort to protect this

information.[20] In addition, although the depression and other ill-effects of this incident will fade in time, as a long-time sufferer of what is presently still considered a terminal illness, Doe very likely has only limited time left. These circumstances make it particularly difficult for someone not in his circumstances to determine the impact of this incident on Doe's life. The jury was free to consider Doe's short life expectancy when assessing the impact of this incident upon him. Obviously, given Doe's condition and its associated societal stigma, it is difficult for others to step into Doe's shoes and to judge his emotional reaction. In such circumstances, the court is particularly hesitant to second guess the determination of the jury, which had the opportunity to infer from Doe's appearance and demeanor on the stand a sense of his emotional reaction to this event which cannot be communicated by mere transcript excerpts. *See Balistrieri*, 981 F.2d at 933 ("[A] jury may glean as much if not more about a witness's emotional state from the witness's demeanor than [sic] from his attempts to explain the nature of his injury in words."). While the court admits that the award by the jury in this case may be greater than the award the court would have ordered had this been a bench trial, it was not so irrational or excessive as to shock the judicial conscience. *Cf. Bolden*, 22 F.3d at 33-34 (upholding $250,000 award for emotional distress).

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[20] Doe testified that he had told fewer than a dozen people about his illness in the ten years he had suffered from it. More importantly, Doe testified that before he filled his first prescription for an HIV-specific medication, he asked Press whether prescription information was reviewed at SEPTA, and was told that it was not.

Accordingly, the defendants' motion for a reduction in damages or a new trial will be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John Doe, a SEPTA Employee, Plaintiff	:	
v.	:	Civil No. 93-5988
Southeastern Pennsylvania Transportation Authority and Judith Pierce, individually and in her official capacity, Defendants	:	

ORDER

(Filed Jun. 2, 1995)

AND NOW, on this 1st day of June, 1995 upon consideration of Defendants' Motion for Judgment as a Matter of Law, or in the alternative Motion for a New Trial (Doc. No. 67), of Defendants' Motion for Reduction of Damages or in the alternative for a New Trial (Doc. No. 68), and of plaintiff's responses thereto, **IT IS HEREBY ORDERED** that defendants' Motion for Judgment as a Matter of Law will be **GRANTED** as to Doe's failure to train claim *only*; in accordance with Federal Rule of Civil Procedure 50(c)(1), in the event that this decision is reversed by the Court of Appeals, Defendants' alternative Motion for a New Trial is **GRANTED** as to the failure to train claim. In all other respects, Defendants' Motion for Judgment as a Matter of Law, or in the alternative Motion for a New Trial is **DENIED. IT IS FURTHER ORDERED**